THE HINDU LAW

OF

BAILMENT

MATILAL DAS

Author of Bankimchandra, His life and Art.
The Soul of India etc.

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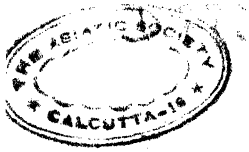

PREFACE

The study of the Hindu law possesses a profound attractiveness and a profitable pursuit to the man of culture. It stood apart from the great progress, the law made in countries outside India but still it is the embodiment of the most perfect example of the Aryan Laws. Hindu law still requires careful study and investigation in order to unravel the amazing development it underwent in days gone by. The following study, based upon original researches, I believe, will advance our knowledge in a branch of Hindu Jurisprudence, of which as far as I am aware, there has been as yet no systematic and accurate study and will therefore enable us to broaden and amplify our knowledge of the comparative Jurisprudence.

I have studied the subject independently and the translations of the original texts are generally mine. I have not however hesitated to avail myself of the results of the standard works on the subject. The thesis is based on materials which are found in Manu, Yajnavalkya, Narada, Birhaspati, Katyayana, and other minor Smritikars, the Arthasastra of Kautilya and specially in the digests, Smriti-chandrika, Vivada Ratnakara, Parašáramadhava, Vivada-Chintamani, Saraswati-Vilasa, Viramitrodaya and Vyavahara-Mayukha as well as on Cole-brook's famous digest.

I have followed the method adopted by Justice Storey, the classic writer on Bailments and have derived much help from him and the essay of Sir William Jones. I have studied the works of the great masters of law on the modern Jurisprudence and have noted special obligations in their appropriate places. It is difficult to state how far the thesis will extend the domain of knowledge but without presumption, I may say that my discussion about the secular character

of the Hindu law, a detailed exposition of the Hindu law of Contract and Bailment, the analytical and methodical study in the light of historical developments and their comparative values will prove interesting and would tend to the advancement of our knowledge of the commercial and practical life of the ancient Hindus.

I have tried my best to bring together scattered subjects and put them into an organic whole. I claim that I have followed the Indian point of view and have endeavoured to breathe life into the dead bones of law by putting it, in a style that will have an appeal to the general reader. It is no use to extol the past for it is dead and gone. The present study is brief. Much remains yet to be said, but I hope its purpose would be served, if it enables us to learn wisdom for the present and to approach the ideals we seek in future.

As the book was hurried through the Press in a period of chaos and lawnessness and as I am not an expert in proof-reading, certain mistakes have occured in printing. Diacritical marks have not been used, as it has been printed in a moffusil Press. I had a mind, to add an appendix with the Sanskrit texts, but as the book became bulky and as it is difficult to print Sanskrit types here, I refrain from doing so. My thanks are due to many friends who have helped me in many ways.

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To the Sweet Memory

Of

My ever beloved wife

Sreejukta Prabhabati Das

Now

In Heaven.

The Hindu Law of Bailment.

CHAPTER I.

INTRODUCTION.

1. Importance of the Hindu Law of Bailment.

The Hindu Law of Bailment is a monumental evidence of Hindu Juristic genius. For comprehensive appeal as well as for solid contributions to the world culture, Hindu civilization can boast of a firm and secure place among the world forces that have shaped and will shape the progress of humanity.

The wonderful civilizations of Babylon, Egypt, Assyria, Persia, Greece and Rome are dead and gone. Of all the archaic cultures, Hindu India alone possesses a clear, connected and full account of the progress of civilization for a continuous period of 6000 years.

But there runs among the people, not the ordinary run, but even among the erudite scholars, the false notion that Hindu genius was deficient in secular and practical affairs of the world. The classical verdict of no less an authority than Prof. Maxmullar that the Hindus were a nation of philosophers is still believed and accepted in scholarly circles,

This estimate is no more than a half truth and the researches of the savants are daily unravelling the achievements of the Hindus in Arts and Sciences, in Politics and Government, in Legislation and Statecraft, in mechanical inventions and maritime activities, in assertion of popular rights and the expression of popular life in Assemblies and Parliaments—(Sabha and Samiti).

The present study does not afford scope for detailed examination of this interesting subject and I rest content with the mere assertion that the Hindu culture is unrivalled in the history of the world for its all-round growth and development, for its broad and comprehensive out-look and for its immortal attainments in all the domains of knowledge and arts.

For a true interpretation and appreciation of this remarkable culture, a study of Hindu Law is essential. Law is an important aspect of national culture and marks the march and progress of a nation in the scale of civilization. Law is an outgrowth of the needs of man in society. It has been well said that law among the other social sciences has the distinct characteristic of being, like language, not merely an integral part, but an integral mirror of social life. Hindu Law is not a mere phantom of the brain, imagined by Sanskritists without law and lawyers without Sanskrit' as has been said by Nelson in his book "A View of the Hindu Law p. 2."

We get a truer estimate of Hindu Law in Jolly's Tagore Law Lecture, p. 1. when he says :—

"The Indian soil has not only been productive in deep thinkers, eminent founders of world-religions and gifted poets ; but it has brought forth a system of law, which, after having spread over the whole vast continent of India, has penetrated at an early period into Burma and Siam and has become the foundation of written law in these two countries". The history of Hindu Law is practically the history of India and covers a period of six milleniums from 4000 B. C. to the present day. The study of the Hindu Law of Bailment will therefore be an interesting study not only from the stand-point of jurisprudence but also from that of national history.

In his classic essay on Bailment, Sir William Jones says :—

"There is hardly a man of our age or station who does not every week and almost every day, contract the obligation or acquire the rights of a hirer or a letter to hire, of a borrower or a lender, of a depositary or a person depositing, of a commissioner or an employer, of a receiver or a giver in pledge, and what can be more absurd, as well as more dangerous than frequently to be bound by duties without knowing the nature or extent of them and to enjoy rights of which we have no just idea."

No better expression can be used to show the importance and utility of the law of Bailment, which lies at the foundation of many of our ordinary daily dealings as well as many of our commercial contracts ; and which therefore deserves a special study.

While writing in 1781, Sir Jones expressed great astonishment that "so important a branch of jurisprudence should have been so long so strangely unsettled in a great commercial country and that from the reign of Elizabeth down to the reign of Anne, the doctrine of Bailment should have produced more contradictions and confusions, more diversity of opinion, and inconsistency of argument than any other part equally simple".

But our study would reveal that the Hindus had a very clear and comprehensive knowledge of the subject, long long centuries before this and an analysis of the same would throw considerable light on the social and commercial life of the ancient Hindus and at the same time would be proof positive of Hindu legal genius.

It may be said however that a study of this subject is useless, in as much the Indian Contract Act of 1872 has superseded the Hindu Law of contract.

After the acquisition of property of the East India Company, the Royal Charter in 1661 enjoined that in judging persons under the sway of the Company, the laws of the kingdom should be followed. Various measures were enjoined from time to time but they

proved ineffective, and on a complaint of the Court of Directors in 1726, Mayors' courts were established at each of the settlements.

After the grant of the Diwani in Bengal, Bihar and Orissa, Sadar Diwani Adalat and Sadar Nizamat Adalats were established in Calcutta. In 1773, the Regulating Act was passed by the Parliament, empowering the Governor-General in Council to frame rules and regulations for the good government of Bengal. Similar powers were subsequently given to the Governors and Councils of Madras and Bombay.

The Statutes establishing the supreme courts in Calcutta, Madras and Bombay provided that "in all disputes between the native inhabitants, their inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party should be determined in the case of Mahomedans by the laws and usages of Mahomedans and in the case of Gentoos, by the laws and usages of Gentoos."

In 1862 High Courts were established for each of the Presidency towns of Calcutta, Madras and Bombay. It is incumbent upon the High Courts in exercise of their original jurisdiction to apply the personal laws of Hindus and Mahomedans, subject to legislative enactments. The Indian Contract Act does not cover the whole field of contractual obligations. In cases therefore, not provided for by the contract Act or other legislative

enactments, the High Courts must apply the Hindu Law of Contract to the Hindus when the parties are Hindus or where the defendnat is a Hindu. No doubt, except the rule of Damdupat, there is hardly any occasion for evoking the aid of the Hindu law. Consequently it may be said that the Hindu Law of Contract has been abrogated by legislative enactments and the subject has nothing more than an academic interest for the ordinary professional lawyer. But it has been well said by the learned editors of the Vivadaratnakar that a study of Hindu Law is essential for administration of the principles of equities, justice and good sense.

I quote their words :—"There are large gaps and interspaces in the law of this country, which our Courts of Justice are required to fill up by the application of the principles of equity, justice and good conscience when cases arise for decision ; for which there is no positive rule. The law of the country embodies the history of a nation's development and reflects the character of the people and knowledge of the law of the people of their own, will enable the Judges and legislators to form a correct view of what is proper rule to lay down, when they are called upon to legislate and such knowledge is equally valuable to lawyers who were to advise the judges as what would be conducive to the promotion of the welfare and well-being of the people (Vivadaratnakar-xxxiii-edited by Golap Chandra Sastri and Digambar Chatterjee).

In this connection, I may refer to what Tindal C J. said about the Roman Law, "The Roman Law forms no rule binding in itself on the subjects of these realms : but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived if it prove to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the ground-work of the municipal law of most of the countries of Europe." "Acton-v-Blundell, (1843)12 M & W. 324. (quoted in T. L. lecture-Roman Law in modern practice. James Mackintosh.) The Hindu Law is a better collection of the wisdom of ages. It stands in the fore-front of the great systems of the ancient world. The words of Chief Justice Tindal therefore apply with greater force to the Hindu Law, which for its intrinsic merits and thorough-going advancements should be looked upon with reverence and imagination.

But apart from its practical utility in Law Courts, the study of our subject has immense value to the student of scientific jurisprudence. The prediction of the eminent lawyer Dr. Ghosh in his Tagore Law lectures on mortgage that "Hindu Law will at no distant date render the same service to jurisprudence that Sanskrit has done to the sister science of Philology" has not been yet fulfilled. A critical and analytical study of the

different branches of Hindu Law is essential for the interest of comparative jurisprudence.

2. Conception About Positive Law.

Secondly, the study would convince the readers that the Hindus had a very perfect and clear conception of positive law and would thereby remove the erroneous view that Hindu Law is a mere blending of morality, law and religion. An eminent lawyer like Dr. Gour says, in the introduction of his Hindu Code p. 42. "Hindu Law is in essence a purely religious law. Like the laws of other modern nations, it has never been secularized and its progress in consequence has been retarded."

To digress a little, the Hindus were all along aware of the elemantary fact that law is distinct from morality. The confusion is the result of using one word Dharma for all kinds of duties, moral, legal and religious. But it would be an untruth to say that they did not understand this primary distinction. While commenting on the meaning of the word 'Dharma,' the great Juris-Consult, Medhatithi says that Dharma denotes duty.

The word 'Dharma' is used to denote what is duty and what is not, what is enjoined and what is forbidden as well as what is unseen and rituals relating to the unseen."

The duties of man according to him are two-fold ; one is based on the Vedas and the other on reason. The

duties based on Vedas can be known only from the Vedas. No other logical reasoning can establish them ; while the other duties of life can be known by the ordinary logical method of deduction and induction. He explains this by reference to agriculture and sacrifice. How agriculture is conducive to the welfare of man is known by the process of induction by agreement and difference. But there is no perceptible proof of the utility of sacrifice. One can know them only from the Hymns and the Brahmans. (cp—Bhasya 2/5.)

He elucidates the point very clearly in the Seventh Chapter of Manu. He says while commenting on the duties of a king :—"I have already pointed out that Dharma denotes duties. The subject at present is the discussion of the duties of a king. The duties are two-fold, first the effects of which are seen, such as the six qualities of a king, secondly, the effects of which are unseen such as the Agnihotra and other sacrifices. Now here are instructions chiefly on secular duties based on reason—so it is called Raja-Dharma."

This clearly shows that Civil laws are laws based on reason. The word for civil law is Vyavahara. This word has been used in different senses in the legal literature of the Hindus. Katyayana says that 'vi' means many ; 'aba' means doubt and 'hara' means solution and thus the derivative meaning is decision by which doubts are settled. It means also dispute, agreement as well as judicial procedure and law.

As early as the Dharmasutra of Gautama, we find that a king was to do his duties in conformity with the civil law, the Vedas, the Dharma-sastras, the Vedangas, the Puranas, the laws of race, caste and family which do not conflict with the Vedas. The civil law is given as the highest authority for the king as it is placed first among the authorities to be followed. (G. xi. 19-20).

The Mahabharata says that the authority of the Vyavahara law is as sacred and as great as that of religious law. The sacred law owes its origin to the Vedic lore, while Vyavahara owes it to the government and the king. Government is a sacred thing as it has been ordained by the creator. The Mahabharata continues to make a clear distinction between the two and says that civil law is based on the need for administration of society and is to be studied by kings and rulers, while Vedic injunctions are mere canonical laws whose sole object is the spiritual advancement of society. Bhisma, the venerable grand father, speaks on to Judhisthir "Vyavahara, likewise, has its origin in the sovereign. The government, spoken of, has the same authority and both government and law having authority in the king are to be studied by us. The Smriti law of penances owes authority to the Vedas and these laws that originate in the Vedic lore look up to spiritual values, while Vyavahara, O Judhisthir, is ordained by the Creator and is the saviour of the people. Vyavahara, which has truth for its soul and

welfare as its end, upholds the three worlds. What is government is secular and is our eternal law. The secular Vyavahara is a branch of knowledge and is our own Veda. (Santi Parva, 121. Chapter).

This is sure and clear indication that the distinction between the secular and the canonical laws were accurately understood by the ancient Hindus. The Maurya Code of Chanakya strongly corroborates this view. Kautilya says that the king is the law-maker (Dharma-pravartaka) and adds :—

Sacred law, civil law, custom and the editcts are the four legs of law. Of these the latter is superior to the former. Dharma is based on truth, Vyavahara on witnesses, custom on the traditions of the people and the king's orders are known as the Sasanas. Whereever there is any conflict between the custom and Dharma or between Vyavahara and Dharma, then the matter shall be decided in accordance with Dharma. But when Dharma conflicts with the rational law, reason is authority therein and the text is invalid there. (Kau-Bk. III) These slokas are to be found in Brihaspati, Narada and Katyayana and in the Smriti Chandrika, we find a very illuminating and elaborate discussion on this matter.

Katyayana says that that decision is by Dharma where the offender is brought to justice for his offence and when the lawful owner gets back his money. Where the disputes are settled according to the

procedure of the Dharmasastras, it is by vyavahara. This is the normal administration of justice by means of human witnesses and documents. Where judgments are given according to the particular customs of the people, whether right or wrong, it is by custom. Laws made by the king and not opposed to reason, Sastra and custom are the regulations of the king. Brihaspati subdivides each of these four methods of administration of justiee.

Smriti-Chandrika explains how the latter of the four-fold legs supersede the former. If a king molests a princess and if he denies it, out of fear and if the witnesses depose falsely, then though he is liable under the sacred law, he should be released on the face of Vyavahara law. If a cowherd is accused of adultery, and he is proved to be guilty, still he shall escape as such offences are in vogue among them. None should enter the inner apartments of a man—this is law and custom, but the order of the king overrides this law and custom and and an officer of the king may enter it to detect a a criminal or for some other lawful purpose.

These facts are sufficient to establish that the idea of the positive law was not unknown and that Vyavahara was the term for civil law as opposed to Dharma or duty which is very comprehensive and includes the entire body of rules by which society is held together.

What Miraglia says in his legal philosophy is very correct. "The Aryan race has always had a true

conception of law and political life. The greatest juridical monuments of antiquity, the Indian books, the Roman law and the Germanic laws belong to this race, which tends to reconcile the authority of the state with the freedom of the individual." (p. 120).

Thought and expression remain the reality of history. In their juristic thought, we may call it better ethico-juristic thought and in their clear and lucid expression of the law, the Hindus attained real mastery. Hindu law should be studied from this angle of view and it should bring, I am sure, a rich harvest for maintaining the rights of man.

3. The ethical idealism of Hindu Law.

But at the same time, it cannot be gainsaid that a lofty notion of moral ideal was from the very beginning the guiding force of the Hindu Law. Varuna was the God whom the Vedic seers approached as the divine ruler of the world.

"What'er exists in heaven and earth, what'er beyond the skies.

Before the eyes of Varuna, the King unfolded lies".

(Muir. vol. v)

The law of the mighty king was known as Rta. The imaginative seers of the hymns observed the the world-order in the regular movements of the sun and the moon, of the stars and seasons and conceived that a universal law of harmony reigns behind the

apparent chaos of this life and world. Rta thus stands for the natural laws that govern the physical world as well as for the moral order and the law of righteousness and mercy,

"O Varuna, whatever the offence may be which we may as men commit against the heavenly host,
When through our want of thought, we violate thy laws, punsih us not, O God, for that iniquity."
(Rigveda VII-Griffith-89-5.)

The conception of Rta, the eternal harmony and order, pervading the universe, is a Vedic theory of very great importance and moulded the character and tune of the later Hindu law. Everything evolves out of the innate nature of Rta, so law according to Hindu conception contains its authority within itself. Jaimini defines Dharma as that object of welfare which has got an inner urge. The sublime passage in the Brihadaranyaka (1. 4. 14) gives the noblest definition of law. It says···· "Law is the power of the powerful, so there is nothing higher than law. Thence even a weak man rules a stronger with its help as with the king's help. Therefore law is what is called truth. And if a man says the truth, they say he utters the law and if he declares the law, they say he utters the truth, thus both are the same."

The ultimate good of society loomed large before the Hindu lawyers. It was therefore, all through its varied developments, imbued with the spirit of ethical

and religious outlook, A similar conception is now gaining ground in the west. Vinogradoff says :—"There is one side of the ethical aspect of the state which deserves special notice even in our days ; namely the tendency to regard the state as the main agent in raising the individual from the selfishness and narrowness of his private existence to the interests, feelings and habits of an enlarged personality. The idea of the enlargement of personality involved in social life is a profound and fruitful idea, consciously and unconsciously a man is lifted by the process of expansion from the level of his immediate appetites to a comprehension of duties, of rights, of justice, to a practice of self-control and salf-sacrifice." (Outlines of historical Jurisprudence. Vol. I. 95)

The eminent Jurist, Lord Haldane spoke in the same strain in one of his remarkable speeches :—

"Law properly so called, whether civil or criminal means essentially those rules of conduct which are expressly and publicly laid down by the sovereign will of the state and are enforced by the sanction of compulsion.

Law however imports something more than this. As I have already remarked, its full significance cannot be understood apart from the history and the spirit of the nation, whose law it is. Moreover it has a real relation to the obligations even of conscience, as well as to something else, which I shall presently refer to as

the general will of the society. In short, if its full significance is to be appreciated, larger conceptions than those of mere lawyers are essential ; conceptions which come to us from the moralist and the sociologist, and without which we cannot see fully how the genisis of law come about. There is where writers like Bentham and Austin are deficient" (21 C. L. J. 35n).

4. Methods of study.

The Hindu conception of Rta finds a parallel in the Hellenic concept of harmony and I am sure that if its nature is understood, it would stimulate law to a nobler and higher conception of its task. Law is an organism. It lives and grows. It is the outcome and result of the economic and social conditions of the countries of its birth and the expression of the intellectual capacity of the people thereof in dealing with those conditions. In this world of change, laws and institutions change. Law is not an artificial product, created by the wisdom of kings, parliaments, legislatures, judges and jurists. It is an organic growth, connected with the histories, life and temperament of the people. We can say that it is a part of the national inheritance just as our language or religion is.

The historical method of jurisprudence which takes a coherent view of the law by following the various stages of its growth and by analysing its developments and noting how it keeps pace with the general advancement and progress of the people is the best method.

The analytical method, on the other hand, takes the law in a static condition, examines its separate parts and studies how it performs the function for the purpose of which it was evolved. The two methods are complimentary. Abstract theories must be brought to the touch-stone of fact and experience.

India is not immobile. Her law and varied history is the history of growth and progress and in the development of her law, the usual motor forces acted and reacted. The factors of evolution are many and these cosmic co-effcients differ in intensity and kind in the different periods and regions.

It could have been therefore profitable to study our subject from the stand-point of evolution and trace stage by stage the gradual change in the law of Bailment. In that study, one is not only to study the facts and conditions of the subjects as depicted in the sources of the period but to show also how the original simple principles were extended to kindred cases to which they were not originally applicable, to note chronologically the introduction of more liberal and and progressive principles as a solvent on the hard crust of archaic law and lastly to discover the emergence of new ideas owing to a change in environment and out-look.

To understand the development we are to study on the perspective of the various well-marked periods of history. But exact chronology being still unavailable

in india, it is difficult to give any account which will satisfy the scientific reader in definiteness and precision. It is not possible to determine the sequence and successive order of events. It is a lementable fact that the opinions of the experts differ in matter of chronology, in most of the cases, not by centuries alone but by mileniums. As for example, the famous Code of Manu is placed in the twelfth century B. C. by Sir Arthur William Jones and 150 B. C. by Jayaswal. Indian history requires to be rewritten on the basis of Pouranic chronology and the up-to-date discoveries and researches.

It has not therefore been possible to follow the historical method, though highly desirable, as it is not easy to make any headway in the wilderness of uncertain chronology. Moreover the limited scope of this thesis does not afford space to show the historical growth and development of such an important branch of law.

I have consequently followed the analytical method mainly but has touched on the historical and comparative value of the subject as far as has been possible. The difficulties in the path of a complete and perfect exposition are many. I have tried to do my best, The greater insight which is daily being obtained in the history and culture of India will render the writing of a complete treatise more feasible as time goes on. The object of this study will be served if it evokes a a greater interest in a subject which gives a vivid insight

and an intimate knowledge into the actual life of the people.

5. Sources.

All history is limited by the evidence and records left of a people's life in the past. Briefly speaking, the sources of our informations cover the vast field of Indian literature, including the Vedas, the Smritis, the epics, the Puranas, the books of politics and history, and even literary works. The Buddhist and Jaina literature, the accounts of foreign travellers and epigraphic records also supply scattered materials. In volume and variety, it is very extensive.

The Hymns, the Brahmanas, the Aranyakas and the Upanishads are known as revealed literature and and these together from the vast Vedic literature. In theory, the Vedas are the supreme source of all law. But the ultimate authority of the Veda does not merely refer to the concrete texts but to a hypothetical philosophical view of the law. Veda means knowledge. The highest truth and knowledge cannot be learnt by reason. It is a principle transcendent, supraintelligible ineffable and so it is an object of faith and revealation. The human law should conform to this eternal knowledge and eternal law. We must not forget that the ancient law-givers of India had this ethical and philosophical conception in mind when they referred to Vedas as the original source of the law,

The Vedic literature however contains very little information abut forensic law, but its rich mine should be explored for discovery of norms and embryos of the later laws. The Vedas contain extensive reference to Rna, of which pledge is an accessory contract and the Brahmanas give indication of the factum of deposit.

The two national epics, the Ramayana and the Mahabharata and the Puranas give graphic pictures of the social life of the ancient Indians and their pages require a closer scrutiny for finding materials as to how the various branches of law were actually administered. Of the Puranas, the Agni, The Matsya and the Skanda, which contain chapters on civil law, are specially important. The extensive Smriti literature contains the actual law-books or Dharmasastras. Manu defines Smriti to be Dharmasastra. (M. 11 10). This legal literature divides itself into three broad classes viz. the Sutras or Aphorisms of law, the Dharmasastras or the Codes of law, most of which are metrical and lastly the commentaries and the digests. Side by side, with the Dharmasastras, there were numerous works on Hindu polity known as Arthasastras or Nitisastras. In the Mahabharata, and in Kautiiya, we find mention of the different schools of polltical theories. Hindu politics developed pari passu with the legal literature and most of the noted Nibandhakars wrote books on the science of government. For a clear understanding of Hindu

law, we must make use of materials obtained from both these classes of books.

The Sutras are manuals in the form of brief rules and as a class are prior to the metrical Smritis. Of the Sutras, Baudhayana and Apastamba are connected with Vedic charanas and seem to be older than the other Dharmasutras and contain most Dharma laws. Gautama, Vasistha and Vishnu seem to be later redactions of old Sutras of the same name and contain chapters on civil law. There are many other fragmentary Sutra works.

The metrical Smritis are the most important sources of our knowledge. It is not possible to fix dates, which in the words of the learned scholar, Rajkumar Sarbadhikary, became ignis fatuus to Sanskritists which, by its illusory light, leads on to bogs and marshes from which they find it difficult to extricate themselves. From internal evidence however, we can say that of the Smritikars, Manu, Yajnavalkya, Brihaspati, Narada, Katyayana followed each other In order and point of time.

Kautilyas' Artharastra, the most remarkable book on Hindu Polity of the 4th century B. C. must be placed between Yajnavalkya and Narada.

Jayaswal in his Tagore law lectures on Manu and Yajnavalkya has tried to establish that the Manu Samhita is the work of one Sumati Bhargava, who flourished in the reign of the regicide Brahmin king

Pushyamitra and he places Yajnavalkya in the period of the Gupta-Kings. There is no place here to enter into this highly controversial matter but we differ from the great orientalist on the following grounds among-cothers. Kautilya's work bears from its internal evidence an advanced view on legal matters and must be deemed anterior to Yajnavalkya and Manu. Kaulilya says that Itihasaveda is part of the Vedas and the king should spend the evening in hearing the Itihasa. He says that Purana. Itivritra (history), Akhyayika (tales), Udaharana (Illustrative tales) Dharmasatra and Arthasastra are known by the name Itihasa. (Kau-Book 1 chapter 5. p 10) This proves conclusIvely that in Kautilya's time, the Dharmasastras have gathered round them a hoary antiquity, so they are referred to as forming parts of the Vedas and there were actual treatises on Dharmasastras in the time Manu is the acknowleged authority on the ground that he was the best interpreter of the Vedic lore. He occupied therefore the first place among the Smritikars. In the Skandapurana, we get a sloka that there were four recensions of Manu—those by Bhrigu, Narada, Brihaspati and Angira. The recension of Bhrigu which we now call the Manu Samhita is no doubt a later redaction and may be a product of the Sunga dynasty but it contains most of its old form. Yajnavalkya bears the stamp of development from Manu, but a comparison between the texts of Manu and Yajnavalkya and

Chanakaya would clearly show that the Arthasastra contains more advanced views. The classification into details of the law of contract, the division of the law courts into civil and criminal, the arrangement of matters in dispute, all show development and progress from the age of Manu and Yajnavalkya.

The latest stage of the legal literature is formed by the Tikas and Nibandhas, which adopting the fiction of Ekvakyata, dovoloped the Hindu law to a considerable extent. These commentaries and digests simply purported to propound the already existing law but in the guise of interpretation, they introduced much that is new in order to harmonise the prevailing customs with the old law. These great jurists of the medieval age succeeded in embodying the current laws of their time by their glosses.

From the practical point of view, the works of these Hindu Jurisprudentes are indispensable guides to the law of India. This group of works, whose number is legion and many of which are still in manuscripts and have not been scientifically edited and published is important and is the surest help to the understanding of the Smritis and for tracing the progress and development of the law.

A list of the principal juris-consults in order of time with the names of their works is given below for ready reference.

1. Asahaya—His commentary on Narada is a work of the 8th century.

2. Medhatithi—His colossal Manu Bhaysa is a work of the 9th century.

3. Viswarupa is the earliest commentator of Yajnavalkya and is an author of the 8th or early 9th century.

4. Vijnaneswara—The famous author of the Mitakshara flourished in the early part of the 11th century.

5. Govindaraja—His Manu-Tika is very useful for the purpose of elucidation of the text and is ascribed to the 11th century.

6. Apararka has got a large commentary on Yajnavalkya, written by the first quarter of the 12th century.

7. Laksmidhara is the author of Smritikalpataru, a work of the 12th century.

8. Devananda Bhatta wrote Smritichandrika in the early part of the 12th century.

9. Jimutavahana, the famous author of Dharmratnakara, of which Dayabhaga is a part, was born towards the end of the 12th century.

10. Madhavacharya flourished in the 14th century in the court of Bukka, king of Vijoyanagar. His Parasaramadhava is a standard work.

11. Chandeswar, the prime minister of the king of Mithila compiled his famous Smritiratnakara in the 14th century.

12. Narayan sarvajna's Manvartha-vritti of the 14th century is remarkable for its originality ; some ascribe it to the 12th century.

13. Misaru Misra published his Vivadachandra in the name of his patroness, Laksmi Devi, in the 14th century.

14. Nrisinha Prasada, a minister of the Musalman king of Ahmednagar, wrote a great Smirti work in his own name in the early part of the 15th century.

15. Kulluka's terse and precise tika is a work of the 15th century,

16. Vachaspati Misra is the reputed author of Vivadachintamani a work of the beginning of the 15th century.

17. Raghunandan is the greatest Smarta of Bengal and lived in the 16th century. His Astavinsati Tattwa is the standard work of the Nabya Smriti School in Bengal.

18. Varadaraja lived in the later part of the 15th century in the south and wrote a Smriti called Varadarajiya after his name.

19. Prataparudra composed his Saraswativilasa with the help of court Pandits in the early 16th century.

20. Nanda Pandit composed his Vaijayanti in 1622 A. D.

21. Kamalakar's Nirinayasindhu was written in 1616 A. D.

22. Mitra Mistra is the author of the famous Viramitrodaya of the 17th century.

23. Nilkantha composed his reputed Smriti Mayukha in 1640 A. D.

24. Laksmi Devi published her Tika on the Vyavahara chapter of Mitakshara soon after Mitra Misra.

25. Vivadaranta-Setu was composed at the request of Warren Hastings.

26. Jagannath was the author of Vivada-Bhangarnava, written towards the end of the 18th century. It was translated by the famous scholar, Colebrook and it is better known as Colebrook's Digest from its translation. Among the historical and litterary works Raja-Tarangini and Mirchhakatika contain special reference to the law of our study,

Some valuable hints can be gathered from the accounts of travels left by Megasthenes, Fahian, Alberuni and others.

6. Periods of development.

We shall have to traverse a period of about six thousand years. It is a continuous and unbroken history but still there are to be noticed distinct periods which divide Indian history into different epochs determined by the principles of social dynamics, which tend to transform one stage of society into the next. Each of these ages have distinct features and characteristics which modified themselves into the civilization of the next epoch under the forces of great social causes. Without however following the exact historical ages, we may conveniently divide the growth of law into four well-marked periods viz the Vedic period including

the Sutra period, the early Smriti-period down to Kautilya, the Post-Kautilya Smiriti period and the period of digests.

The Vedic period, with its three distinct creative age of Hymns, the age of the ritualistic texts—the Brahmanas and the age of philosophical speculations, the Aranakayas and the Upanishads as well as the Vedangas cover at least a period of 3000 years from 4000 B. C. to 1000 B. C. The revealed literature is the product of the age.

The early Smriti-period extends from 1000 B. C. and saw the composition of the epics, the older Puranas, the Dharmasatras of Manu, Yajnavalkya and some others and the famous Arthasastra of Kautilya.

The second Smriti-period extends from 300 B. C. to 500 A. D. The bulk of the Smritis were composed in this period.

The period of the digests ranges from the age of Kumarila, the great Mimansaka of the 8th century down to the early British rule.

This classification is some what arbitrary, we shall have to build up with the available materials at our disposal the picture of social relations in the domain of contract with special reference to bailment in these four periods. The analytical account given by me cannot but be somewhat unsatisfactory for want of a more comprehensive historical background. But still I hope that it will reveal to us a glorious picture of the

cultural progression of the Hindus. The eulogy of Sir William Jones deserves repetition :

"It is pleasing to remark the similarity or rather identily of these conclusions, which pure unbiased reason in all ages and nations seldom fails to draw, in such judicial enquiries as are not fettered and manacled by positive institutions and although the rules of Pundits concerning the succession to property, the punishment of offences and the ceremonies of religion are widely different from ours, yet in the great system of contracts and the common intercourse between man and man the Pootee of the Indians and the digests of the Romans are by no means dissimilar" (works vol viii—P. 445)

7. Constitution of the Hindu courts.

The earliest name to a court of justice is sabha. The decision of this Vedic popular assembly was inviolable (Narista). The Vajasaneyi samhita mentions the sabha-chara as being dedicated to Dharma or justice (chap xxx, 6). It was the national judicature and is accordingly called the shining and the sounding one, for performance of justice in the Paraskara Grihya (iii. 13)—(Nadirnamasi Tvishirnamasi). The Taittiriya samhita mentions the village judge as Gramyavadin and the Maitrayani calls his court as sabha.

Manu retains this name for the king's court. We gather from the Smritis that there was the royal court,

where the king assisted by learned assessors used to administer justice. It was ambulatory and moved with the king.

There was then the stationary court of the chief justice appointed by the king who used to carry on his duties assisted by three, five or seven assessors.

There were again the courts of inferior judges appointed by the king who used to sit in differeet parts of the kingdom.

Besides the king's courts, there were the popular courts, known as Puga, Sreni and Kula. These were the courts of families, corporations and communities. We get from Yajnavalkya (II 30) that judges appointed by the king, the Pugas, the Srenis and the Kulas should be respected in order of their mention in matters of legal proceedings, Vyavaharamayukha explains these terms. The court of the chief justice and the other judges are the king's courts. Pugas are communities of various traders living in the same village but of different castes. The Srenis are corporations of traders of the same caste and the Kulas are gatherings of castemen, relatives and family members.

The decisions were subject to appeals. An unsatisfactory determination of the Kula court is revised by the Srenicourt, that of the Sreni by the Puga court. From the judgment of the Puga, an appeal lies to the king's court and from the king's court to the king himself. Another name for Puga is Gana Yajnavalkya

refers to the Janapada court (1, 360) which would correspond to the District courts of our days. The local courts had delegated authorities of limited scope.

But it is evident from this reference to a network of lawcourts and from the very careful law of procedure and evidence, described in the digests that the Hindu law was not merely an ideal picture of what ought to be the law but is an embodiment of the actual law as administered in the law courts.

Asahaya in his commentary on Narada gives us an actual picture of a law suit in the Pataliputra court. The story in brief is this :—one Sridhara lent 10,000 gold coins to a trader Devadhara and used to get 200 coins monthly by way of interest.

Devadhar and his son died suddenly. The great grandson of Devadhar, a minor became the owner. His property was managed by his relatives. A lawyer called Drudhara advised them not to pay the money, saying that a greatgrandson is not liable for the ancestral debt of the greatgrandfather. It was however decided by the court with the help of Smarta Sekhara that the fourth in descent from the debtor is liable but it ceases with the fifth in descent.

The trial scene in Mrichchakatika is another example of the procedure followed in law court. The interesting law of pleadings and evidence is outside the scope of this essay. One who reads them cannot but be

convinced that the ancient administration of justice in India was on a level with our modern system.

In the light of the above discussions, I can say that ours is a refreshing study. Though no longer the living law of the land, the Hindu law of Pledge and Bailment is most thought-provoking. It is interesting to contemplate that centuries before the birth of christ, it was a fully developed subject of study. Its scope is comprepesstive, its province is clear and defined.

My humble attempt will suffice to show that there is a wide field of research in the matter yet unexplored.

It gives us solid materials for building the edifice of scientific jurisprudence and embellishing the philosopy of law. It will amply repay the student of the law of contract to study the principles which our far-seeing forefathers followed in their dealings between man and man.

Further it will establish that humanity is one and that in the efforts for cultural activity, the East and the West have followed the same methods, Today in the midst of chaos and anarchy in the world, we hope for an international outlook. We wish the world to be full of peace, order, beauty and variety and to be full of life, freedom and energy for progress and development. In this neo-idealism of world-planning, on a basis of equality and fraternity, a study that establishes the unity of man and his culture in different ages and different climes has an additional value irrespective of its service to jurisprudence.

Finally it will show the dynamic nature of the Hindu law and sketch how conformably to changing cultural demands, Hindu law was able to adjust and adapt itself like any other juristic system of the world.

Our outlook on juristic learning should not be insular and one-sided. Hindu law shows very little trace of foreign influence. India was never averse to take the best from whereever it was a avilable, but it may be said that in the domain of law it is incomparabley independent of foreign admixture than any other system of law.

The study of comparative law is growing apace and the time is ripe that the Hindu law should find a place in the legal curriculum of the universities of the civilized would. For its scientific character and educational value, such a claim will not seem to be a biased view of the present writer. My admiration for the ancient Hindus is deep and I have tried my best to infuse something of my reverence in this thesis but I trust I have not gone to the length of over-emphasis and exaggeration in exposition of the legal ideas of contract and bailment. Despite the great work done in the past, our knowledge is still very poor. If this study calls forth a new zest for the principles of Hindu law, my labour would be amply rewarded.

CHAPTER II.

The fundamental principles of the Hindu Law of Contract.

Man is a social being. Social intercourse is a necessary factor in human life. Sir Thomas Strange in his Elements of Hindu Law says: "Scarce a day passes with any man who has anything to do with the business of life, when he is not entering into, executing or fulfilling one contract of some kind or other. Their diversity is infinite, and the objects involved in them are vast and most important. But in the first place, they rest for their formation and solution, upon principles so general that they have been considered to belong to the law of nature, as manifested in the concurrent practice of civilized nations, and therefore in essentials, are common alike among all people." Contracts are thus every day affairs of human life and the object of law is to preserve good faith iu the mutual dealings of men The earliest reference to the obligation of contract is to be found in a Rigvedic hymn (IV 24, 9-10). An image of Indra was sold for ten milch cows. The seller goes to the purchaser and asks for a higher price. He even asks for a return of the image after the purchaser has made use of it. But this is not allowed. It appears from the text that the price fixed at the sale, whether adequate or inadequate should be adhered to. There is a fine

poetic imagery—both milk the udder. The needy buyer and the shrewd seller try to make as much as they can out of the bargain. But contract once made was inviolable.

Pollock says—"The specific mark of contract is the creation of right not to a thing but to another man's conduct in future." A developed society cannot but recognise the relations between human beings which arise out of agreement out of their life together in society. The advanced Vedic social life cannot fail to take note of contractual relations and obligations which were necessary in those days.

Ausija Kakshivan, a famous Rishi of the Rigvedic time, was at first dull of understanding. He was restored to knowledge and wisdom by the Asvins. He promised to perform thousand sacrifices for Svanaya Bhavya, dweller on the bank of the Sindhu and the king promised to bestow magnificent gifts if he could finish them. The contract was performed and in a hymn (1-126), Kakshivan eulogized the king for his magnificent gifts including some of the fine breed of horses.

Miraglia says—"Contract arises from voluntary obligation and comprehends all the part of private law that is called from it jus volubitarium. For a valid contract there must be an offer and an acceptance of the same. Complicated questions arise how and when the contract is perfected, when offer and accep-

tance does not take place simultaneously. The right to make contracts emanates from the freedom of human activity and this freedom is the nerve of the development of the individual and the culture that he produces. But this demands that there should be the contemporaneous meeting of the minds of the parties to the contract."

In the Vinaya Pitaka Chullavagga Vi. 4. 9. we find a very interesting story about a fight between a prince and a merchant over offer and acceptance. Sudatta, a merchant of Sravasti, who is better known as Anathpindada, for his charity to the destitute, was converted into Buddhism by Buddha himself at Sitavana in Rajagriha. On his return to his own city, he wanted to build a retreat for Lord Buddha. Prince Jeta had a park not far from the town and he wanted to acquire it for the rest house. Jeta said that it could not be bought except with as many gold coins as would cover the field. Sudatta accepted the offer but Jeta tried to back out saying that there was no bargain. The matter went to the law-court and it was decided in favour of the merchant.

The actual words of conversation are given below from the original. He went to the prince and said this :—your highness, let me have your garden as I want to make a rest-house in it." "It is not for sale, oh householder ! even if it is laid over with crores of coins."

"I take the garden, your highness, at your price."

"No sir, the garden has not been taken."

They asked the Lords of justice whether the garden was taken or not, and the lords gave the decision, "The park has been taken, sir, at the price you fixed."

"A contract is any act or forbearance or promise by one person given in exchange for the promise of another (Ames—Lectures on legal history p. 323). According to the English doctrine, a valuable consideration is neeessary to make the contract valid and binding. It therefore requires fictitious pretences of consideration when promises are given and obligations are undertaken from motives of disinterested friendliness and affection.

Continental systems however require that obligations must have justa causa otherwise they would be exposed to attack and revocation. The cause is the aim or intention inherent in the contract and therefore must be known or supposed to be known by both the parties.

As Vinogradoff says: A distinction between consideration and motive is drawn in the English Theory in the sense that no motives are recognised except those derived from material profit and loss. (Outlines of historical jurisprudence p. 21).

But the continental system allows a wider scope for motives but an attempt had to be made to draw a line of demarcation between cause and motive. The motive is the impulse that prompts the transaction.

The Hindu law on the other hand gives prominence

to consent, to the mutual concurrence of wills, in any contract, the Sanskrit word for it is Vyavahara.

Students of ancient law are accustomed to regard the early history of legal transactions, as dominated by more or less rigid formalism. In Roman law, the mancipatio, the nexum, the stipulatio and many other transactions are characterised by ceremonial acts and solemn words without which the transactions remain imperfect and void. The same fondness for sacramental acts and words is to be found in Germanic, Celtic and Slavonic systems of law. But except in cases of marriage contract, adoption and ceremoninal gifts, there is nothing like the legal ceremonies to be found in respect of the above laws in the Hindu law of ordinary and formal contracts. Contracts in Hindu law did not depend on the strict adherence to any particular form. The obligation in Hindu contracts depended on consent, in the mutual concurrence of wills. The early prevalence of consensual contracts among the Hindus is the result of lively commercial intercourse between the peoples of India. There is mention of both inland and sea-borne trade in the Rigveda. The story of Bhujyu, who was rescued in a hundred-oared galley, points unmistakeably to marine navigation. The word 'Sresthi' occurs in Aitereya Brahmana, in the sense of a merchant prince.

The doctrine of consideration so dear to the heart of Common Law lawyers seem to be absent in Hindu

law. The Hindu law rather insists on its ethical character. What Kohler says in his philosophy of law applies very particularly to the Hindu law of contract. "From the beginning, the law of obligations has had also an ethical character, everywhere ethics stood by its cradle. But at the same time, it has also been the means of raising the ethical standard of humanity. The ethical element that enters into consideration here is the reliability or dependableness of the person. Here, too the object is to exclude chance and replace it with law and rule. If a man has once given his word, it must not depend on chance whether he fulfills it or not, others must be able to build on it and to arrange their affairs accordingly. A man who is true to his word acts more morally than one who is not, first because he obeys a rule and not his own desire and then because in the interest of another, he struggles against his humour and egoism which might lean him to break his word. Adherence to a promise thus reaches deep into moral life. It follows the command of truth which here is moved from the present into the future. The person who promises must make his word come true, for when he promises, he gives the assurance that in the future some definite thing will occur and he must see to it that it does occur.

Like everything of an ethical nature, this too was originally bound up with religion and hence has a strong cultural significance, for religion is always

promotive of inner culture and gives utterance to the deeper needs of humanity. But even separated from religion, ethics has been of importance for the development of mankind."

The truth of this is best illustrated from the story of Ramayana. King Dasaratha of Oudh promised to give to his wife Kaikeyi, whatever she would wish on two counts for her faithful nursing. When the king was going to appoint his son Rama, the favourite of all as king, Kaikeyi asked for two boons—by the first she asked that Bharata should be made king and by the second, she wanted that Rama should go to exile for 14 years. The king was bound by truth and had to remain true to his words.

The idea that a man must keep his promise is one of the main pivots of the law of obligations. The Ramayana gives stress on the sacredness of pormise and shows how Hindu culture gave importance to ethical nature of contracts. The fulfilment of his vow led Dasaratha to do injustice to Rama but that is beside the point here. The strict adherence to the principle of faithfulness to an agreement is what concerns us in the story.

A contract is a two-sided act and is an agreement, a declared concurrence of will of two or more persons whereby a change in their legal relationship is the object. Parties thereto may be individuals or corporate bodies. Guilds and corporations by the names of Puga,

Gana, Vrata, Kula, Sreni etc. are to be found from earliest times. There are special laws for companies of those days. These joint concerns were called Sambhuya-Sammuthanas by Narada.

There are several ways however in which persons may be or become incapable wholly or partially of doing acts in the law and among other things of becoming parties to a binding contract.

Manu's provisions on the point are as follows : A contract made by a drunken person, a lunatic, a diseased man, a wholly dependent man, an infant or a very aged man or by an unanthorised person is invalid.

Agreements made against law, usage or public policy have no binding legal force, even though established by evidence. A mortgage, a gift, a sale or an acceptance obtained by fraud or any transaction which involves fraud shall be declared null and void.

What is given by force, what is possessed by force, what has been caused to be executed by force and all transactions done under coercion and duress have been declared void by Manu (M. 163—5. 168)

Yajnavalkya provides : Contracts entered into under force or threat or the like are to be set aside even though completed. Contracts made by women, or at night or inside the house or outside the village or by enemies are null and void. (Y. 2. 31)

Contracts made by a person intoxicated, insane, invalid or distressed, by an infant or done by fear and

the like are ineffective as also those done by an unauthorised person.

In Kautilya's Arthasastra, these rules are developed and we get that there should be no seclusion and secrecy in contracts. Accordingly contracts entered into inside the house, at night, or in forests are invalid. There are however legitimate exceptions. Agreements made as above are valid if they ware within hearing of others or subsequently acknowledged or if the agreements by their nature are to be made privately. Covenants relating to partition of family property, sealed and open deposits or marriage or by women who live in seclusion or by invalids who are sound in mind are operative even if made inside the house.

Among the contracts of night, those relating to acts of adventure, conspiracy or affray or marriage or those that are made under orders of government, those that are entered into by persons, who usually do their business, in the first part of night, are valid in law.

Of the contracts, made in the forests, those that are made by merchants, cowherds, hermits, hunters or spies, who frequently roam in the forest are enforceable in law.

Intention and consent being the soul of every agreement according to Hindu law, the law-givers have taken great care that the mind of the parties should

be in a condition capable of entering into the agreement. Kautilya therefore goes on to discuss the other incapacitating circumstances.

Obligations which are the result of fraud, coercion, duress are invalid. All agreements entered into by fraud except those by spies in the discharge of government duties are invalid.

Contracts that are made by dependent or unauthorised persons, such as by a son having a father, a father having a son, an outcast brother, the youngest brother of a joint family, a wife having her husband or son, a slave, a hired labourer, a person who is too old or too young to carry on business, a convict, a cripple or an afflicted person or by one who has become a hermit are not valid. Upon the same principle, the law watches the influence on the mind of the various passions which disturb it, such as fear, anger, lust and grief, so contracts made by a person in anger, distress, intoxication or lunacy or under duress are not enforceable.

Kautilya then describes the requirements of good and proper contracts. All contracts which are made between proper parties in presence of witnesses respectively of one's class, in proper place at proper time, with free will and power are valid. Contracts should observe the full procedure and the proper place and should look into the form, circumstances and authority of the obligations. Of several agreements,

with the exception of pledge and order, the latter in date supersedes the former. (Kautilya—Bk III)

Kautilya thus gives us the quintessence of the requirements of a valid contract and we cannot but feel a thrill of pleasure to see that the Hindus had developed so early as the 4th century B. C., a correct and elaborate conception of the law of contract.

The restrictions. as to the witnesseses of one's class, place and time were laid down with an eye to the actual habits of people in their ordinary recourse of life. The Smriti-writers observed that people generally associated with their own likes, so it is enjoined by Manu that women should give evidence for women, twice-born men for twice-born men of the same class. virtuous sudras for sudras and men of the lowest caste for the lowest (M. 8-68).

Yajnavalkya lays down that—'Men devoted to austerities, charitable persons, men of noble birth, truthful men, straightforward and virtuous persons, men having sons and wealth, shall be witnesses according to caste or class but failing them all should be witnesses for all. (Y2—68-9)

It follows therefore that the law prescribes that people should make contracts in presence of caste men of the same sex and occupation in the first instance, failing which in presence of castemen having a different profession and failing that in presence of witnesses of other castes.

Kantilya's dictum that স্বে স্বে তু বর্গে দেশে কালে চ স্বকরণ-কৃতা সম্পূর্ণচারা শুদ্ধদেশা দৃষ্টরূপলক্ষণপ্রমানগুণাঃ সর্ব্বব্যবহারাঃ সিদ্ধ্যেয়ুঃ।" is a brief but beautiful summation of the fundamental principles of contract. The phrase 'svakarankrita' in the text may mean either done out of one's own free will or a contract evidenced by a written document executed by oneself. The prior meaning is however the better one.

The Arthaşastra gives in its lucid way an expression of the law which is admirable and authoritative.

If must be in presence of witnesses, with no secrecy whatever and must be clearly expressed and evidenced by documents whenever possible, and observing all the formalities and done in proper place and time and it is further provided that the circumstances, the object and the authorities all must be lawful.

The law is illustrated and developed in the subsequent law-books. The contractor should be a a person who has the effective use of his reason and can legitimately carry out his intention. Narada enjoins "Though generally his own master, what a man does, while disturbed from his natural state of mind, the wise have declared not done, because he is not then his own master."

Jagannath's commentary on the above has earned the praise of Sir Thomas strange and deserves quotation as it explains the essentials of consent in a very lucid

manner. "Some infer the meaning: "where the volition of an owner, discriminating what may and may not be done and guided solely by his own will declares, as is actually intended by him, his own property devested and dominion vested in a person capable of receiving and actually intended by the doner, over the thing really intended to be given; that volition vests property in the donee." In case of fear and compulsion, the man is not guided solely by his own will, but solely by the will of another. In the case of a man agitated by anger or the like, he is not the person, who discriminates what may and may not be done. If terified by another, he gives whole estate to any person for relieving him, from apprehensions, his mind is not in its natural state: but after recovering tranquility, if he give anything in the form of a recompense, the donation is valid. What is given as a bribe, or in jest, is a mere delivery or a gift in words only, there is no volition vesting property in another. As for what is given by mistake, as gold instead of silver which should have been given, or anything delivered to a sudra instead of a brahmana it should have been given, the gold and the sudra are not the thing and the person really intended namely silver and a brahmana. Though it be ascertained, that ten sovereigns should be paid, if any how, through inattention or the like, fifteen sovereigns be delivered, the gift is not valid, for they are not

what was really intended to be given or the donation in this case is void, because the giver did not discriminate what should or should not be done. Where much is proposed and little given, (as where a man proposes to give much for what may be effected at little cost, and after the work is accomplished, pays the simple due ;) then, since the excess was only promised or delivered for the purpose of deluding, the will to vest property in another is wanting and the gift is therefore void ; as in the case of bribe : but with this distinction, that in the case of a bribe the whole gift is utterly null, and here it is void in part.

(Colebrook's Digest vol II p. 299-300)

The very beautiful commentary can not be quoted in full length but the above gives a full explanation of the principle. To put it in the words of Miraglia—'the consent must be determinate, that is, it must be an act of firm intention to alienate or acquire.'

I now give below some of the texts which will explain the law of contract and shall discuss their meaning and implications later on. Most of these texts are on void gifts but the disqualifications apply to all branches of the law of contracts and invalidate them. Narada says :—what has been given by a man agitated with fear, anger, lust, grief or the pain of an incurable disease, or as a bribe or in jest or by mistake or through any fraudulent practice must be considered as not given.

What is given by a minor, an idiot, a slave, by a person who is not his own master, by one diseased, intoxicated or insane, by an outcast or what is given in consideration of work unperformed is invalid ; so is what is given through ignorance to an unworthy person who says that he is worthy or for an immoral purpose (V. R. 134. Digest vol II-297.)

Bhrihaspati says :—what has been given by one angry or through inadvertence or excessive joy, or by one distressed or by a minor or a lunatic or under the impulse of terror or drink, by an extremely old man, by an outcast, idiot or by one affliected with grief or pain or what is given in jest, all these are void. If anything be given for a consideration unperformed or to a bad man mistaken for a good one, or for any illegal act, the owner may take it back (Digest vol. II-314. Bhrihaspati 15-9-11.)

Gotama says :—The words of a man influenced by wrath, excessive joy, terror, sickness or avarice or of a minor, of a decript old man, of an idiot or of one intoxicated or mad are vain.

Katyayana says :—Whatever is received for giving information of a thief or a robber, of a man violating the rules of his class or of an adulterer, for producing a man of depraved manners ready to commit thefts or other crimes or for producing a man to give false evidence. This all is given on an illegal consideration. The giver shall not be fined

but an arbitrator or the intermediary receiving a bribe, shall be held guilty.

If a bribe be promised for any purpose, it shall by no means be given, although the consideration be performed. What has been given by men under the impulse of lust or anger or by such as are not their own masters, or by men diseased or deprived of virility, inebriated or of unsound mind, or through mistake or in jest may be taken back. (Digest vol II-310-12)

When a man who is on the point of death says—'I shall give the whole of my property to any one who saves me' such a gift even though made would be invalid (V. R. 134)

Some of the invalidating circumstances which make contracts void are according to English law—(i) minority (ii) insainty (iii) idiocy (iv) coverture (v) want of authority (vi) error or mistake (vii) fraud (viii) duress (ix) contrariness to public policy and morals and to positive law and (10) impossibility. First, as to minority, all persons must attain a certain age before they are admitted to full freedom of action and disposition of their property. The age of majority is fixed at sixteen years. Every one under that age is an infant.

Hindu jurists say that a minor is one who from nonage is unable to discriminate between what should or should not be done. Chandeswar and Misra explain that this term minor is employed indefinitely

and comprehends a decript old man. In many texts, both minors and excessively old men are expressly mentioned. But where it is not so used, the word 'Vala' would include minors who are in the words of Kautilya 'Apraptavyavahara' and old men who are 'Atitavyavahara.' Mitakshara and Parasaramadhava fix the age limit at 16, but some commentators say that a minor is not to be limited to age—it means any one who is unable to discriminate between what is right and what is wrong. In this sense, if becomes a synonym for an idiot.

Idiots and lunatics are debarred from contracting, because in their case, there is no meeting of the minds which is essential for the formation of a contract. They are not in a position to give free consent. But this incompetency does not become a bar during a lucid interval when the lunatic is capable of understanding what he is doing. (Digest. vol II. 309) This includes drunkenness when there is a temporary deprivation of consenting mind.

Under the English law, every woman who marries has to sustain, as incident to her new status, technically called coverture, a loss of legal capacity in various respects. But "coverture in Hindu law does not disqualify a woman from entering into contract 'A Hindu female' observed Justice Nanabhai Haridas, 'is not on account of her sex, absolutely disqualified from entering into a contract. In the enumeration of

persons, incompetent to contract, given by Manu, Yajnavalkya, Katyayana and Gotama, a woman as such is not included ; and marriage whatever other effect it may have, does not take away or destroy any capacity possessed by her in that respect. And Yajnavalkya and Katyayana by declaring that wife is bound to pay the debts contracted by her, clearly recognise her power to contract.' (Banerjee—T. L. Lecture on Marriage and Stridhana).

When agents act for a man, there must be authority in the agents to bind the principal. An unconnected person who is neither related nor authorised can act on behalf of another, An unathorised person is technically called 'Asambandha' by Manu and Yajnavalkya. Medatithi explains the term to mean a person who works for another.

There is one test however when an unauthorised contract by an agent is said to be enforceable in law. Katyayana says :—Bhrigu ordained that a man should pay a debt contracted in his absence, even without his assent by his servant, his wife, his mother, his pupil or his son, provided it were contracted for the subsistence of the family (Digest vol 1—17). Kautilya also enjoins that legally incapacitated persons should not enter into agreements unless authorised.

The sixth and seventh invalidating grounds are error or mistake and fraud. The reality and completeness of consent is affucted by ignorance, either negative

or positive, A mistake does not invalidate the transaction always. Material errors only affect when they are such as to affect any real agreement being formed. Error and mistake may take various forms —it may be a misunderstanding about the nature of the agreement, or about the identity of the subject matter, about the identity of the person, about the name or the substance. Mistake is a false belief about the contract into which the contractor falls of his own accord, fraud is mistake caused by the other's trickery or deceit. They both cause an untrue belief in the mind of the promisor.

The Sanskrit words for these are 'vyatash' and 'upadhi.' Vyavaharamayukha explains it as giving gold through mistake in place of silver and chhala is practised when Debadatta was to be given a cow, it is taken by a man inpersonating him.

In Jagannath's commentary we find—"According to the opinion of Misra, such a fraudulent practice is comprehended in this description, for chhala or fraud is synonymous with upadhi, since what is denoted by the word chhala or deceit employed by Manu, Brihaspati expresses by the word upadhi. Upadhi in general is any improper act. Consequently in every case of improper gift, when a donation is falsely promised, there is fraudulent practice. Chandeswara subjoins 'and the like': where a man entrusts his own property to another for the purpose

of deceiving his creditor or the like, saying 'it is given to him' the gift is void and this should be included under the term 'the like'. Other cases may be determined in this manner, by intelligent consideration. Here the gift is void, because the will of vesting property is wanting, and the want of such will is inferred from the improbability of such a gift being intended from the character of the person or from the necessity which then existed of deceiving him or from the intention of the parties; this and other points should be determined by the wise."

Vivadachintamani explains vyatash as mistake in respect of the article given or the person to whom it is given. Viramitroydaya explains chhala as giving of hundred only while representing it to be thousand.

Duress is the technical name for Coercion and undue influence. Manu calls it vala. 'Vala' can be either physical or mental, the former make a man submit as a machine, the latter deprives the victim of the use of his mind and free will. Vala may also consist in actual compulsion or in the threat of it. Bhaya is menace. The inner conception behind it is that the contractor should have the intelligent use of mind and free will. When he agrees under duress, he is renderd incapable of giving valid consent. Any act done by a man under fear is not done by him, for Narada says that at the time of the agreement the man is not his own master.

In M.164, we get that contracts which are violations of established rules of decency, morals or good manners as well as against public policy are void. Medhatithi illustrates contracts against the spirit of law and good practice in his commentary. An agreement against the positive law of 5 per cent interest is not enforceable. A sale of one's life or children is invalid as it is against rules of decency and morality. The giving away of one's whole when one have children is void because it is against good practice.

Smritichandrika says that the restriction of giving one's entire property refers to the case of a man who has sons and grandsons living jointly with him and does not apply to the case of him who has no issue or who has given to his offsprings their share of the inheritance (S. C. 442)

Vivadachintamani however following Smritisara, says that man's ownership over his entire property is absolute, so he can legally make a gift of it. All that the prohibition rules is that it is sinful and not that the gift is invalid.

Contracts with enemies were not enforceble because they offend against the interest of the state.

Kautilya lays down the law that an agreement for an immoral undertaking, a transfer of property under fear for criminal case and an agreement for sedition and such contracts are illegal as they are opposed to public policy.

A contract to be valid must be definite in character and possible of performance. The possibility is of three kinds, physical, moral and legal and for this reason Kautilya insists that the form, the quality, the circumstances are to be looked into. (দৃষ্টরূপলক্ষণ প্রমাণগুণাঃ)

Developed culture requires ethics in legal intercourse. Where there can be no confidence, commerce will draw back timidly but where there is truthfulness and faithfulness, economic life would flourish to its full capacity. The above brief consideration of the Hindu Law of contract is sufficient to convince the unbiased reader that the Hindus had acquired an efficient law of contracts at a very early period.

The right of Rescission.

Hindu law also recognised the right of rescission. In the English law this right is given generally in cases of voidable contracts. It is exercised when a false representation is made to a party knowing it to be false and with intent to mislead and is acted upon by the other party, he can rescind the contract. There is a division of law called 'Rescission of sale and purchase.'

Manu says that if after purchase or sale, a buyer or seller repents of it, he may return or take back that article within ten days. After ten days, he shall not return or take it back. If he does, he shall be fined by the king. (M. 222—3)

Yajnavalkya says that if the previous purchaser does not accept the article sold and delivered to him, it may be sold afresh, if the commodity has been damaged in the mean time, the purchaser shall be liable for the loss. (Y. 2—255)

Narada says that if having purchased an article for a certain price, the buyer thinks that it is not a bargain, he should return it on the same condition on the same day. If he returns it on the second day, the buyer shall loose one-thirtieth part of the price paid ; if on the third day, he shall suffer one-fifteenth and after that the thing must remain with the purchaser. (N. 9—2-3)

These are cases of sale and purchase of chattels not susceptible to rapid deterioration and different writers gave different periods for return and rescission. After the expiry of that period, one could not violate the contract.

There is no case of misrepresentation in the above cases. About misrepresentation we get the following texts in the Digest. Narada—He who having shown a specimen of property free from blemish, delivers blemished property, shall be made to pay double the price to the vendee and a fine to the same amount.

Brihaspati—The dishonest man, who sells a commodity, knowing its blemish, but not disclosing it, shall pay double the price of it to the vendee and a fine of an equal amount to the king. Wilful violation of a contract

was not only a civil injury ; it was a crime aud was puhishable by fine, imprisonment, or banishment. But this does not mean that the Hindu lawyers did not understand the difference between civil right and crime. Vardhaman in his Dandaviveka, a work of the 16th century has explained the matter very carefully.

Civil disputes always originate from greed or ignorance and so it comes to pass that some, either the plaintiff or the defendant is guilty of false assertion of right or dishonest concealment of facts, so some punishment is necessary. But the subject matter of Dandaviveka has no concern with offences which are incidental to civil wrongs. It concerns the suppression of offences which are reported to the king by spies and which are brought before tribunals by the police officers of the king ; as distinguished from those wrongs which are tried on a private complaint. For example, a debt and its non-payment is an offence from one point of view. It is however in essence a civil affair and not a crime though punishment is inflicted for wanton denial of liability. But in murder and other crimes, the offender is brought before the court for infliction of punishment but in a civil dispute, the main object is the ascertainment of the truth or falsity of the transaction. If a penalty is given, it is merely incidental. The predominant feature of crime on the other hand is [লোকদ্বেজকত্বম্] its quality of causing alarm to the people. (Dandaviveka—P 32)

Contracts according to English law are of three kinds viz (1) contracts of record (2) contracts under seals and (3) simple contracts.

In the Hindu law we have analogous provisions. Transactions according to Vishnu may be attested by the king, attested by witnesses or unattested. Brihaspati mentions Danapatra, Prasadalekha and Joypatra as documents written by the king.

Documents witten by common people were written by a public scribe, in a public place and were of seven kinds dealing with partition, gift, purchase, mortgage, agreement, bondage and debt. (Vide P. M. 92)

Yajnavalkya provides that whatever contract is entered into by mutual consent, there should be a document, attested by witnesses, headed with the name of the creditor. If shall give the month, fortnight and date, the name, caste, gotra, Vedic charana, the names of their father etc. (Y—2—84 5)

Other Smriti-writers have given elaborate and very precise descriptions about the manner, method and form of documents and the formalities to be observed therein.

Documents were insisted on by the law-givers as the best evidence of contracts between the parties but documens were not essential. There were oral contracts made. The evidence of Megasthenes is a proof positive on the point. He says—"The simplicity of their laws and their contracts is proved by the fact

that they seldom go to law. They have no suits about pledges or deposits nor do they require either seals or witnesses but make their deposits and confide in each other. Their houses and property they leave unguarded. These things indicate that they possess good sober sense." (Fragment XXVII)

This is also corroborated by Hiuen Tsiang who came to India a thousand years after him. "With respect to the ordinary people, although they are naturally light-minded, they are upright and honourable. In money-matters, they are without craft and in administering justice, they are considerate. They dread the retribution of another state of existence and make light of things of this world. They are not deceitful or treacherous in their conduct and are faithful to their oaths and contracts. In their rules of government, there is remarkable rectitude, while in their behaviour, their is much gentleness and sweetness. (Buddhist Records-Beal. Bk—II)

Harita says that if a loan is advanced without a pledge, or security or deposit, and also without a bond and witnesses, it cannot be proved, if there be dispute over it. (S-C.—220)

So in case of oral contracts, parties should see that there are reliable witnesses to the contract. Vishnu says that one man alone cannot be a witness and Gautama enjoins that witnesses should be many. Brihaspati defines twelve kinds of witnesses, of whom a smarita

witness was called during oral contracts. He is one who after being called, witnesses the transaction and then is repeatedly reminded of it. A chance witness also may prove such transactions. He is called Yadricchika.

It is seen therefore that though we have not the English names for different classes of contracts in Hindu law—there were both oral and written contracts. Manu, Yajnavalkya, Kautilya and all other law-givers are alive to the importance and superiority of documentury evidence. Though oaths and ordeals were in vogue, the Jurists gave stress upon Lekhas. It is ordained that for decision of dispute, documents should be relied on at first and only in the absence of documents, witnesses should be called to establish the truth and if no witness is available, recourse should be made to oaths and ordeals.

Consideration.

The modern English doctrine of consideration has been one of gradual development. The definition given in Currie vs Mida (L. R 10 Exch 142. 1875) is :—A valuable consideration in the sense of the law, may consist in some right, interest, profit or benefit, accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Consideration is essential to the validity of a contract. As said before, English

law has to evolve fictitious consideration in case of trust and confidence. Pollock says :—The modern theory of the obligation incurred by a bailee who has no reward is that the bailee's delivery of possession is the consideration for the promise to keep or carry safely. The bailer parts with present legal control of the goods and this is so far a detriment to him, though it may be no benefit to the bailee, and the bailee's taking the goods is for the bailer's use and convenience. Hindu law does not busy itself with this view of contract. According to it, free and open consent is the essence of agreement. In this respects, it is akin to the French theory of adequate cause. Some however interpret Kautilya's phrase দৃষ্টৈরূপলক্ষণ প্রমাণগুনাঃ as implying that contracts should be for adequate and lawful consideration. The language of Kautilya is precise but very expressive. It can bear the meaning that there should be lawful consideration in the formation of contract. But as already told by me, the great commentators of the Hindu law look more to the intent, more to actual agreement that anything else in the dealings between man and man.

Because of this, there is some difference between the English and the Hindu law on the point.

Pollock says—An informal promise, made without a consideration, however strong may be the motives or even the moral duty on which it is founded, is not

enforced by English Courts of Justice at all. Even a formal promise, that is a promise made by deed, or in the proper techenical language of a covenant, is deprived, if gratuitious, of some of the most effectual remedies administered by them. A promise to contribute money to charitable purposes is a good example of the class of promises, which though they may be laudable and morally binding are not contracts. (Principles of contract—p. 165.)

Hindu law, holds otherwise giving greater weight to truthfulness and ethical values.

V. R. quotes a text of Matsyapurana—'If a man promises to make a gift but fails to give it, he should be fined by the king one gold coin.' (V. R.—132)

Yajnavalkya says,—Acceptance of gifts should be made openly, particularly that of immoveable property. What is promised should be given without fail. What is given should not be removed (Y-2-176.)

Harita says—He, who gives not what he has promised, and he who takes back what he has given, sinks to various regions of torments and springs again to birth from the womb of some brute animal. (D—II—282)

Katyayana says—"He who delivers not a present, which he has promised to a priest, shall be compelled to pay it as a debt and incurs the first amercement.

From the mention of a priest in the text, some lawyers doubt whether it relate not to the promise of

a gift for religious use. But that is not right, in the case of a promise for civil purposes, the delivery of the gift is also necessary. It has been declared that, in the case of a promise for such purpose, what has been promised is inalienable.

Harita says that a promise legally made in words but not performed in deed, is a debt of conscience both in this world and the next.

The commentator asks—How can it be debt, for it is received by them by reason of promise not by reason of loan ? The legislator replies that it is a debt of conscience. From the words—'in this world' it appears that the payment should be enforced by the king. (D—vol. II pp 285-7)

But such promises are enforceable only when it is in respect of what is alienable and when the recipient is legally capable of receiving. The above texts make it clear the difference between the Hindu law and the English law. English law gives emphasis on material loss and gain and their jurisprudence is the result of the commercial instinct of the race. On the other hand, Hindu law is ethical in its idealism. Unless one's agreement is against the universal cultural law which the Vedic seers envisage as Rta—the great moral order, a man must be true to his promise. The principle of faithfulness to a promise in the Hindu law of contracts is evidence of the developed culture of the Hindus who generally moved in a higher plane

of morality and a nobler creed of justice in their commercial, social and economic dealings.

Interpretation of contracts.

I conclude this chapter with a brief discussion about the Hindu rules of interpretation of contracts. The object surely is to understand the actual intention of the parties, to get into the real meaning which led the parties to form the agreement. As Maxwell says—The objecct of all interpretation of a statute is to determine what intention is conveyed either expressly or by implication by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the reader falls within it." Hindu law had its own rules of interpretation. In I. L. R. 14 All. P 70, Sir I. Edge says :—The question is how is the text of Vasistha to be construed. It must clearly be construed according to the rules for the construction of the texts of the sacred books of the Hindu law, if authoritative rules on the subject exist. That rules for the construction of the sacred texts and law of the Hindus do exist cannot be disputed, although those rules have been frequently overlooked or not referred to by Judges or English text-writers probably because they are in Sanskrit and have, so for as I am aware, not yet been translated. That they are rules of the highest authority is obvious from the manner in which they have been referred to by Mr. Colebrooke."

The rules are the Mimansa rules of interpretation and the great and celebrated juris-consults like Madhatithi, Apararka, Vijaneswar, Jimutavahana and others apply the principles and rules of the Mimansa in explaining civil laws.

Each word and sentence must be a Sarthaka word, having meaning and purpose. When one is sufficient, more need not be assumed. This is the principle of Laghava. A word or sentence in one place cannot have a double meaning. This is Arthaikatva. The principal idea should supersede any subordinate idea which clashed with it. This is Gurupradhana axiom. Reconciliation or Samannjasya should be looked into in construction of words and sentences, but when there is real contradiction, each is optional on the Vikalpa axiom.

The texts are to be construed according to the principles of Sruti, Linga, Vakya and Prakarana. Sruti is acceptance of self-evident meaning, without twisting or straining its meaning. Linga is explanation by suggestion and analogy. Vakya is analytical explanation. Prakarana is interpretation by reference to cognate texts.

These rules have been explained and discussed elaborately by Sarkar on his Tagore Law lecture on the Mimansa rules of interpretation. The following are important so far as construction of contracts are concerned.

(1) The sense used by current usage is to prevail.

(2) The popular meaning should be accepted in place of the etymological meaning.

(3) The usual sense which strikes one at the pronunciation of a word (Sruti) should be accepted.

(4) Foreign words should bear their foreign sense.

(5) The same term in ancient and modern text must mean the same thing.

(6) Words used in shastras should bear shastric meaning.

(7) When meaningless otherwise, a word should be used in a qualified sense.

(1) Words used in a technical sense should be used in that sense.

(9) The same word should not have multiple senses.

(10) Vague words are to be explained with reference to the context.

These rules agree substantially with modern rules of interpretation.

It is true that except in Kautilya, there is no general discussion as to the principles and rules of contract, apart from its different branches. This is due to the fact that the Smritikaras followed the classification adopted by Manu and wrote books in his manner on the different topics of litigation. There is no book of abstract Jurisprudence in Hindu law. The law-givers

were bent on solution of the practical difficulties that came in deciding disputes.

A race that is noted for its philosophical accuracy and far-sightednes did not bother much about a philosophy of law and did not try to analyse the deeper significance of human activity in normal cultural life. But though there is this gap, materials are not wanting to build a philosophy of law from the extant Smriti literature.

Hindu law of contract had for its aim the advance of culture and the welfare of humanity. It therefore attached greater value to the sanctity of promise. In the Rigveda, we find that the debtor had to pledge his body and life (Rv. x. 24). Gradually he becomes a debtor-labourer (Y. 2—43). The rigours of the law is slackened. Manu says that the creditor shall recover the dues by (I) good faith (by granting instalments), (II) by tact (III) by trick, (IV) moral pressure or (V) force. The power of the creditor is weakened gradually and the pledge of future action takes the place of the person. In this way, the idea of ethical values and duty came to be attached to the law of obligations. What Kohler says on the point may be applicable in full to the Hindu law. "Obligation involves a 'Shall', that is to say, a command determining cooduct, directed to a certain person and which he must obey if he wishes to be an unexceptionable and unblamable member of a legally ordered society."

Vishnusmriti concludes with a text—It purifies from sin, it is auspicious, it leads to heaven, procures long life, knowledge of the four objects of human pursuits and renown and increases wealth and prosperity.

This ethical note is never lost in its wonderful development from the Vedas down to our own days. Maine in his Ancient law describes the growth of Roman contract law as follows :—"We begin with the Nexum, in which a contract and a conveyance are blended and in which the formalities which accompany the agreement are even more important than the agreement itself. From the Nexum, we pass to the Stipulation, which is a simplified form of the older ceremonial. The Literal contract comes next and here all formalities are waived, if proof of the agreement can be supplied from the rigid observances of a Roman household. In the Real contract, a moral duty is for the first time recognised and persons who have joined or acquiesced in the partial performance of an engagement are forbidden to repudiate it on account of defects in form. Lastly, the Consensual Contractse merge, in which the mental attitude of the contractors is solely regarded and external circumstances have no title to notice except as evidence of the inward undertaking." and he is of opinion that this progress is typical of the history of this class of legal conceptions in other ancient societies. There is nothing to justify such a conclusion in the development of Hindu law. The earliest Vedic reference to the contract of purchase and sale clearly points out that from the very beginning

emphasis was laid to the expression of will and consent. The ancient Indians were lovers of rituals, but it is pleasing to note that this was never blended with legal transactions.

Manu says—ধর্ম্মং শাশতমাশ্রিত্য কুর্য্যাৎ কার্য্যবিনির্ণয়ম্। In administering justice, the king should always look to the eternal law. The law of every country is the outcome and result of social and economic conditions. Law adjusts the everchanging relations between men and men. Hindu law of contract has passed through different periods of history and has developed and changed with the centuries.

But in the midst of progress, Hindu law of contract never lost its foot-hold on the eternal conception of truth and order. From Tapasya arose Satya and Rta and this glorious heritage was ever treasured up in actual life and practice and the Hindus never swerved from the divine rules.

The sense of order and the law of reason do not create law. The social background is necessary for its evolution. The rich social life of India was favourable for the growth of positive laws which stand favourable comparison with other laws of the world. The ethical impulse only curbed the unrestrained freedom of will. Allowing full scope for free development of powers, it prepared the way for a fine and advanced culture by peaceable regulations of human conduct on the nobler ideals of truth, justice and equity.

CHAPTER III.

Nyasa.

Definition.

Nyasa is the Sanskrit equivalent for Bailment. Bailment is a technical term of the common law of England and means, in the words of the classical writer, Justice Storey, a delivery of thing in trust for some special object or purpose and upon a contract express or implied to conform to the object or purpose of the trust.

Sir William Jones defines a bailment to be a delivery of goods in trust, in a contract expressed or implied, that the trust shall be duly executed and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or be performed. (P. 448).

This has been called inaccurate on the ground that there is no delivery in a bailment for sale nor in a consignment to a factor.

The definition in the Indian Contract Act is as follows :—A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when purpose is accomplished, be returned or otherwise disposed of according to the direction of the person delivering them. The person delivering the goods is called the bailer, the person to whom they are delivered is called the bailee.'

This definition overlooks bailment that arises cut of implied contract. And there may be cases of bailment without an enforceable contract.

On the whole, a bailment may be described as delivery on condition, to which law usually attaches an obligation to redeliver the goods or otherwise deal with them as directed, when the condition is satisfied, but there may be in particular cases a bailment without an enforceable obligation. (Judjment of Cave. Reg. V. Macdonald, 1885. 15Q. B. D. p. 328.

We accept it in its widest denomination. Nyasa or Nikshepa is the generic term for bailment and forms the second of eighteen divisions of disputes by Manu. According to Manu, the subjects of litigation are eighteen in number, namely (1) Recovery of debts (2) Deposit and Pledge (3) Sale without ownership (4) Concern among partners, (5) Resumption of gifts (6) Non-payment of wages (7) Non-performance of contracts (8) Rescission of sale and purchase (a) Disputes between owners of cattle and herdsmen, (10) Disputes about boundaries (11) Assault (12) Defamation (13) Theft (14) Robbery and violence (15) Adultery (16) Duties betwen husband and wife (17) Inheritance and Partition (18) Gambling and betting.

Narada adds one more called (19) Miscellaneous. and he gives subdivision of each of the above topics and his acute logical analysis gives one hundred thirty-two heads of law-suits.

The law of Bailment is found scattered in several of these sections. I have gathered and classified them according to the method followed by English Jurists.

Lee in his Historical Jurisprudence writes :—"The law of Bailment was an integral part of Hindu Jurisprudence. The reason for the law is to be found in the insecurity of properties and in the exactions of the state. But the applicatton of the law was extended to a varieties of cases. Thus the bailment to a mechanic of property for work, a repair together with a great variety of other species of bailments, was taken cognizance of by this law."

Manu uses both the words Nikshepa and Nyasa, but styles this branch of law as Nikshepa. Etymologically both mean handing over and are therefore fit equivalents for the word bailment, which coming from the French word 'baillier' means any kind of delivery. Nikshepa and Nyasa are derived from the roots, 'Kshipa' and 'Asa' which give the significance of handing over.

Narada defines Nikshepa :—"When a man through complete confidence entrusts his property to another man, it is called deposit in gereral." (Vy. M. 73)

Bailment implies two things :—a delivery and a trust in the sense of confidence which one man reposes in another. Narada's definition therefore brings the two-fold character of bailment. Vyasa explains the necessity for deposit and defines : "when a man,

because of leaving the place or through fear of the king or with the idea of deceiving his heirs entrusts his property to another, it is called deposit in general.

Jagannath in his commentary says: "Nikshepa denotes generally both the delivery of a man's own effects to another without annulling his own property in them and the effecs so delivered. Nikshepa thus means both the act of bailing and the goods bailed.

We get the earliest reference to deposit in Gautama who says :—Deposits, mandates, things lent for use, hired objects and pledges, if these are lost, should not involve any blameless person (G-XII). He does not mention the word 'Nikshepa'. We get it in Vasistha who provides that a pledge, a boundary, the properties of minors, a deposit, a sealed deposit, wives, revenue and the property of a Brahmin cannot be given away by the king (V-XVI. 18)

Classification.

Exact definition is not easy. A thing is therefore best understood by analysis and description of its parts. The English law generally divides bailments into five kinds :—a deposit, a mandate, a loan for use, a pledge and a hire. Sir William Jones adds innominate bailments and says : "Innominate bailments are those where the compensation for the use of a thing or for labour or attention is not pecuniary but either (1) the reciprocal use or the gift of some other thing

or (2) work and pains reciprocally undertaken or (3) the use or gift of another thing in consideration of care and labour conversely." The Sanskrit names for these six classes are Nikshepa, Anvadhi, Yachitaka, Adhi, Abakritaka and Pratinyasa.

Nikshepa in Hindu law is subdivided into three distinct classes :—(a) when a property is handed over openly to the depository himself, after having been counted, it is called Nikshepa proper or open deposit. —Narada (Vy. M. 73)

(b) When the property is handed over closed and sealed, within a casket, without disclosing the contents or describing or counting it, it is called Upanidhi or sealed deposit (Y-2-65)

(c) When the property is handed over not personally to the depository himself, but in his absence to his son or other relative, with the request that it should be given to him on his return, it is called Nyasa (Vyasa in S. C. p 416, V. R. 83)

Anvadhi or Anvahita is defined by Katyayana as when a thing is bailed with these directions—'deliver this, as by my desire to such a man when he shall demand it for his own benefits' it is called Anvadhi or mandate. (D—vol II p. 8)

Yachita is a loan for use, when any ornament or any such small article is borrowed for a special occasion like a marriage it is called Yachita (V. R. 84)

When a debtor deposits with the creditor ornaments and the like with the object of inspiring his confidence to the repayment of loan, these are called Adhi or Pledge. (V. M—305)

Sir William Jones describes letting to hire as a bailment of a thing to be used by the hirer for a compersation in money or (2) a letting out of work and labour to be done or care or attention to be bestowed by the bailee on the goods bailed and that for a pecuniary recompense or (3) of care and pains in carrying the things delivered from one place to another for a stipulated or implied reward. Abakritaka is the Sanskrit name for hire.

Mitakshara explains Pratinyasa as follows :—When a man says, 'let your jewels or the like remain with me, who reside in a secure place and let my copper vessels and similiar articles which are coveted by my heirs remain with you,' a mutual trust arises and the articles are mutually bailed. In some cases, mutual deposits are made in the form of a sealed bailment and in others by open deposits. Mitakshara says that there should be no mutual deposit in the form of Nyasa but Jagannath says that their is no difficulty for the word Pratinyasa comprehends mutual deposits in other forms. (D-vol II-12)

It is intersting to note that Katyayana has a truer conception of bailment. He makes the term Upanidhi include all the following (1) Purchased articles entrusted

to the seller temporarily (2) articles entrused by a man going on a long journey (3) Pledge (4 bailment for delivery (5) small articles borrwed for special occassion, (6) what is handed over for investing. Katyayana therefore includes most of the classes included in bailments by Sir Jones.

The Hindu law-givers enjoin that the law of deposit will apply to cases of Silpinyasa, guardianship of a minor, Pratinyasa and others. Brihaspati says, "The above rules apply to mandate, loan for use articles made over to artists, pledges and to persons seeking refuge. Narada says—"The law is the same in a loan for use, in a bailment for delivery, in deposits with artists, in mediate deposits, in mutual deposits and in the guardianship of a rich minor."

Leaving aside guardianship and minors and refugees, we find that there are the following classes of bailments in Hindu law (1) Open deposit—Nikshepa (2) Sealed deposits—Upanidhi (3) Deposits in absence—Nyasa (4) Loan for use—Vachitaka (5) Pledge—Adhi (6) Hire—Abakraya (7) Bailment for delivery—Anvadhi (8) Mutual deposit—Pratinyasa (9) Deposit to an artist—Silpinyasa.

Characteristics of Bailment.

We find that Nikshepa contemplates delivery of articles, but this delivery is for a temporary purpose only. There can be no bailment if the whole property

right is transferred and the thing delivered is not to be specifically returned or accounted for, nor when the delivery of property is for an equivalent in money or other commodity, if so, it is a sale or exchange and not a bailment. Bailment constitutes transfer of possession and not of ownership.

The goods bailed may, while in bailee's possession, be altered in form, as for instance corn by being converted into flour ; still if the owner has a right to have the same specific matter redelivered to him the contract between him and the party holding is one of bailment. But it is mere sale, in case he does not take the specific matter. Manu is alive on this point. He says ; "In whatever manner, a person shall deposit anything in the hands of another, in the same manner ought the same thing to be received by the owner. As the delivery was, so must be the redelivery (M. 180)

Kulluka comments on it that whatever thing in whatever manner, whether sealed or unsealed, with witnesses or without witnesses, is placed by a man in the hands of a bailee for a definite purpose, that thing, gold or the like should be returned in the same manner ; as the delivery is, so should be the receipt. This directs that if gold and the like have been bailed uuder a seal and the bailer, breaking the seal, says 'Weigh it and deliver it to me, he shall be punished.' The intention of the text is clear. The self-same thing should be returned.

A bailment in modern law is distinguished from mere deposit and other transactions which result in mere deposits and in the latter case, since the identical money is not to be returned, there is no bailment, for bailment requires that some identical article has to be returned or otherwise accounted for, according to the directions of the owner. This distinction between debt and deposit was well-known to the Hindu lawyers. Jagannath makes this very clear in his commentary. He says that when a man bails his own property, it is a bailment of his own property and Nikshepa does not annull his own property in the effects delivered. (D. II—4)

In the case of money deposited in the ordinary way, there is no bailment, the relation of the parties is that of borrower and lender and is so treated with reference to limitation and bankruptcy. (13 Bom 338)

Jagannath says—'It should be here noticed that in the first place, the borrower asks for money, next the lender gives the money, saying or thinking 'so much interest must be paid and the principal sum be repaid' property is thereby vested in the user or debtor, for the verb 'give' signifies an act vesting property in another after annulling the agents' own property." Hence if the debtor happen to lose that money, the loss does not fall on the creditor and from the same cause, the debtor may at pleasure dispose of which he has borrowed. Afterwards, since by reason of the

agreement made, the amount of the principal sum must be repaid with interest or an equivalent be given, the creditors' property is revived by payment made by the debtor." (D—II 10-11)

The element of care in Bailment.

Kohler says :—It often happened that one person deposited some object with another, by his consent. The idea originally was not that this other should take care of the object, but merely that he should allow it to remain and should refrain from appropriating it to his own use. Only gradually did this develop into the duty of guarding the thing and taking the necessary steps to preserve it. This was specially perceptible where animals were concerned, which had to be fed and cared for and also in the case of plants etc. Thus gradually the contract of bailment developed, but as is comprehensible, the duty of the keeper still remained a slight care and he was not held liable to the utmost care."

Under the Indian Contract Act, in all cases of bailment, the bailee is bound to take as much care of of the goods bailed to him, as a man of ordinary prudence would, under similiar circumstances, take of his own goods of the same bulk, quality and value, as the goods bailed. The ancient Hindu Law was to the same effect.

The Roman Law and the English Law however make certain distinctions between the degree of care required by the different classes of bailments.

Justice Storey says :—"Natural justice would hardly persuade us that the same obligations and the same duties ought to arise in all classes of bailments, and if it would, the general interests of the society and the indulgence to involntary error and mistake which a sense of mutual infirmity insensibly produces, would soon introduce a relaxation of the fixed rule, and fix a practical exposition, which should invite rather than repel mutual confidence. It would be very difficult, indeed, to persuade any civilized community that a depository should be liable for every loss and bound to the same vigilant care of the deposit as a borrower for his own exclusive benefit, or that a mandatory who from mere kindness gives his services to his friend, should have the same responslbility fastened on him, as carrier for hire, who stipulates and receives a suitable and adequate reward for his services and vigilance. And it will accordingly be found that in the most polished as well as in the least refined nations, whether ancient or modern, distinctions in degrees of responsibility have been adopted in all these cases with a surprising uniformity. (Bailment—7th edition P 12).

Sir William Jones writing earlier also sings in the same tune and says that the degree of care should be proportionate to the nature of the bailment.

There are infinite shades of care or diligence from the slightest momentary thought or transient glance of attention to the most vigilant anxiety and solicitude. The standard diligence is somewhere between these extremes and is what every prudent man takes of his own concerns. There are in the same manner infinite shades of default or neglect and the standard is the same. When the contract is reciprocally beneficial to both parties, ordinary diligence is required and one is responsible for ordinary neglect, but it is otherwise when one of the contracting parties alone derives advantage. If the bailor only receives benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee, who ought not to be molested unnecessarily for his obliging conduct. When the bailee alone is benefitted, he should be more than ordinarily careful.

The distinction is conformable not only to natural reason but also, by a fair presumption, to the intention of the parties.

But these fine distinctions about degrees of care is an endeavour at ingenuity, which the advanced Jurisprudence of the modern age has discouraged.

Among the infinite shades of care, three well-marked divisions of a high degree, a common degree and a slight degree of diligence are ordinarily accepted with corresponding divisions of neglect. The common law of England is that when the bailment is

for the sole benefit of the bailee, he should exercise great diligence and shall be answerable for slight neglect.

When the bailment is for the sole benefit of the bailer, the bailee may exercise slight diligence and shall be responsible for gross neglect and if the bailment is for the benefit of both, the bailee may exercise ordinary diligence and shall be liable only for ordinary negligence.

But now even in England, the tendency is to remove the different varying limits upon the obligation in several cases and substitute the same by one uniform rule as in India *ie* standard of diligence of an ordinary prudent man. (Giblin V. Macmillian, 1868 L. R. 2 P. c 317).

The modern law in England requires the foresight and caution which a reasonable and prudent man would exercise under the circumstances and includes reasonable competence, where special competence is needful to ensure safety. Sir Pollock says: "The practical result is that the diligence required in the case in hand will be according to circumstances *ie* that of an ordinary man or some particular kind of experts. Beyond this our law has no hard and fast rules as to different degrees or kinds of negligence, notwithstanding the use of such epithets as gross, ordinary or slight and the misplaced ingenuity that has been expended on endeavours to bring our sys-

tem into line with either real or imaginary distinction in ancient or modern Roman law. (Law of Torts—9th ed. pp. 453-4).

No distinction is recognised in India as to the different degrees of care in different cases, whatever be the object or purpose of the bailment. It is a mark of the practical genius of the Hindus that inspite of their fondness for intellectual subtlety, they make no such subtle differences. The Hindu law looks upon bailment from the view-point of trust and enjoins that a man should take as much care of the properties entrusted as he would take of his own goods.

Bailment is more often a burden, taken by the bailee, out of kindness and generosity. Brihaspati therefore extols it as a meritorious act. He says :—The merit of one who accepts a deposit and preserves it with care is the same as the giving of golden vessels or clothes and this is so in giving shelter to a refugee. The destruction of a deposit by negligence or use is sinful and criminal as is the disobedience to husband by wife or the murder of son or friend by a man It is better not to take a deposit but it is infamous to destroy it after receipt. If taken, one should preserve the deposit, with care and restore it on demand. (V. M.—365.

Jagannath's commentary on it is very lucid and worth quotation. For a written contract of bailment, there is no authority in the law nor in judicial practice,

but doubts may now be obviated by making such a contract. A deposit must be preserved from robbers, from vermins, from decay and the like. If no care be taken and the thing be never inspected, it may decay in the ground or be stolen by neighbouring thieves entering the house, or if it be small, it may be carried away by rats, in those and similiar modes, it may be destroyed.

Why should a man labour to preserve another's property ? The text furnishes a motive, but he, who is not desirous of religions merit, will not preserve it, therefore it directs that the sinful taint of murder is contracted by alienating a deposit without permission and by neglecting to preserve it. The preservation of it is indisensable ; therefore a depsoit should not be received by a person who is not disposed to do an act of duty or amity. (D-II—18)

Katyayana also provides :—When anything is bailed to a person, he should keep the bailment with great care. If it is lost, the loss ls his, except when the loss is due to an act of God or the king. If the bailment is destroyed or lost by fault of the bailee, he should make it good with interest, unless it is lost by the act of God or the king. (S. C. 419)

The word used by Katyayana is 'Prayatna' which means great care but Brihaspati uses the word 'Yatna' (care). But the idea is the same. The care spoken of is ordinary care which a prudent man should

exercise for the management of his own things. It is clear from the text that no blame attaches to the destruction of the deposit, if along with that, bailee's own property is destroyed. Brihaspati says—'If the deposit be destroyed by an act of God or the king along with the property of the depository, then no blame attaches to him (Vy. M. 73). Katyayana makes it further clear. Even if without an act of God or the king, the bailment is destroyed along with the property of the bailee, the loss is of the bailer and the bailee is not liable for it. (S. C. 417).

Narada also says :—What is lost, together with the property of the bailee, is lost to the bailer so also by the act of God or the king, unless there was some fraudulent act on the part of the bailee.

We see therefore that the care spoken of, is the care of an ordinary prudent man in the particular situation and what this should be is a question of fact which varies according to the particular circumtances of the case. Jagannath illustrates this. If a man places the deposit near an old wall, while he placas his own property elsewhere the bailee becomes liable. He is also at fault if he shows the bailment to a greedy king or robber, while he conceals his own property.

As regard this care element in obligations, the provisions of Hindu law are therefore superior to those of the Roman law by making no concession for liberalities but applying the same standard of care in all classes of

bailments. It therefore promoted the growth of greater cultural rights. Modern Jurispudence is now conscious of this healthier view and has accordingly adopting it, in all countries.

Hindu Jurists does not seek any artificial consideration to give binding force to the contract of bailments. The liability of the bailee acordingly seems to be ethico-legal. The reason for the obligation is ethical but the the acceptance of deposits creates certain legal obligations, supported by legal sanctions. If you want to avoid troubles, do not accept a bailment. but if you do, you are to carry out the trust. It is the trust accepted by the bailee which is the ground of obligation and not any consideration, either real or fictitious, proceeding from the bailer in making the bailment.

There is a fine stanza in Kalidasa which illustrates this point. After sending Sakuntala to the house of Dusyanta, Kasyapa says: A daughter, like money, belongs to the other. On sending her to her husband, I am content and free from care, just as a bailee becomes after he returns the deposit. A bailment is an onerous undertaking and when it is discharged, it brings joy and freedom from anxiety. (Abhignana-Sakuntalam—fourth act)

The Hindu law is therefore much simpler but richer in value and outlook on this point.

Acts of God and State

According to the English law, a bailee is not responsible for losses resulting from inevitable accident or from irresistible force except by special contract or by some positive policy of law. Daibarajopoghata is the technical term for acts of God and state in the Smirti-literature. Smirti-chandrika extends the meaning to all those cases over which the bailee has no control.

The relevant texts on this point are as follows :—

Manu :—A bailment which has been stolen by thieves, or washed away by water, or burned by fire, the bailee shall not have to make good the loss, unless he extracted part of it for himself. (M-8-189)

Yajnavalkya,—If the bailment is removed by act of God or the king or by thieves, the bailee should not be made liable for the loss. But if the loss occurs after demand for its return, the bailee should make good the loss and should pay a fine for an equal sum.

The texts of Brihaspati, Narada and Katyayana have been quoted before. Narada's analysis is scientific. He provides two contigencies—one of *vis major*, the other of loss along with loss of his own things. The significance in the second case is that the legitimate inference is that reasonable care and diligence had been exercised.

Katyayana notes a special case and enjoins that when the bailer bails with full knowledge of the risks involved, the bailee will not be liable for any kind

of loss due to any cause, even if not previously apprehended. This is laid down on the principle of estoppel. If a man does a thing with full knowledge of the consequences, he eannot take advantage of his indiscretion.

We find a certain development as we come to the later writers. Katyayana provides the payment of price with interest but Brihaspati lays down that if the deposit is lost on account of the negligence of the bailee making a distinction between his own effects and the bailment, in the matter of care bestowed upon it and if he fails to restore when demanded, he should pay it with interest at 5 p. c. from the date of demand. (S. C. 419)

Katyayana along with Yajnavalkya and Narada lays down that the bailee, if he does not restore the bailment on demand, shall be liable for loss, even if it bc due to an act of God or the king. Narada is lenient and provides for payment of price only but Yajnavalkya and Katyayana say that he should pay the price and should he punished with a fine equal to the price. Manu's text that a bailee is liable when he consumes part of it, has been differently explained. Some say that the bailee must make good the whole deposit. But others say that he should make good the whole, if he accidentally receives any part of the deposit which has been seized by theives or the like. Misra says that this is not proper. A bailee should not be liabie

without any fault in him. If he fails to make known the fact, that he has received part, he becomes a criminal and as a criminal, he is liable for the whole, whether he consumes a part of it, before or after the act of loss.

Katyayana's text has been beautifully illustrated by Jagannath in his commentary. A man addrsssing some person says—'let my property remain in deposit with thee.' He replies—'my house is infested by rats and other vermins, place it not there.' The other rejoins, 'be it so, what can vermins do' and he accordingly deposits the good. It follows that in that case, there is no fault in the baile, if it be lost by neglect. But if he place it out of the house or in another place and in consequence, it be seized by thieves or spoiled by rain or if from anger or other motive, he cast it of his own accord into the water, or if he deliver it to the king, who causes his household effects to be sold on some account of fault, if the bailment is lost by these or other faults, on the part of the bailee, he shall make it good.

When addressing some person, a man says—'Bail this grain to Devadatta and he going to Devadatta says—'this grain is bailed to thee by Chaitra through me and Devadatta answers—'place it in the house' and he places the grain in the middle of the house but in a damp spot and the grain is destroyed by the damp, in this case, the grain shall be recovered from the messenger. But where the owner bails effects notwithstanding

the objection of the bailee and those effects, being neglected are lost, but without any other fault on the part of the depository, in that case no blame shall be imported to the depository.

These provisions are just and fair. They are clear proofs of the forensic insight of the Smritikars. In Kautilya's Arthasastra, the law is equally beautiful. He enumerates inevitable accidents and irrestible forces in an elaborate manner.

"Whenever forts, or kingdoms are destroyed by enemies, invaders or wild tribes, whenever village-groups or merchant-guilds or herdsmen of cattle are oppressed by revolution, whenever the kingdom is destroyed, whenever conflagration or flood brings about destruction of entire villages or partly destroy immoveable properties, moveable properties having been rescued before ; whenever the spread of fire or the rush of floods is so sudden, that even moveable properties could not be removed or whenever a ship, laden with merchandise, is either sunk or plundered by pirates, the loss of bailment, in any of the above ways, cannot be reclaimed. (Kau—Bk. III)

This is highly interesting for it reads almost like a translation of the modern law. Justice Storey says :— By inevituble accident, commonly called the act of God is meant any accident produced by any physical cause which is irresistible, such as loss by lightning or storms, or by perils of seas, by an innundation or earthquake

or by sudden death or illness. By irresistible force is meant such an interposition of human body, as is, from the nature or power, absolutely uncontrollable, of this nature are losses occasioned by inroads of hostile army or as the phrase so commonly used, by king's enemies, that is by public enemies. In the same manner losses occasioned by pirates are deemed irrestible and by hostile force. *** Robbery by force is also irrestible."

A certain distinction is made in the case of theft. A loss by a mere private or secret theft is not deemed irresistible. Each case is to be determined according to the nature of bailment and the degree of diligence used by the bailee.

Theft however is included within acts of God or state by the Hindu lawyers. Brihaspati's text (Brh 12—81) may be strained to have a similar provision as the English law, for he makes the bailee liable, even if the article is stolen, if he had made a distinction between the deposit and his own goods.

Medatithi however explains Manu's text that if arrangement for protection was made, the bailee is not liable, if it be stolen by known or unknown thieves or burglars.

In Mricchakatika, a drama attributed to king Sudraka and ascribed to the 3rd century B. C. there is an amusing reference to deposit. Basantasena, the dancing girl of the king's court fell in love with a

good merchant named Charudatta. In order to have access to him, she deposited a certain ornament with him. This however was stolen by a thief called Sarvalika. Thereupon Charudatta says that people would not believe the fact of theft and would blame him as a wrong-doer. The legal aspect of the matter was not in question and it is no doubt true that Charudatta was actuated by feelings of morality to compensate Basantasana by giving a necklace of jewels, but still it throws a flood of light as to the legal aspect of the matter. It can be inferred that a defence of theft was not generally considered a very good defence. Moreover as nothing belonging to Charudatta was stolen, he could have been defeated in a court of law for his negligence, according to the dictum of Brihaspati.

Property in the Bailed thing.

The growth of individual ownership has been an important factor in promoting human culture, for it has vastly increased and accelerated human powers, because what a man owns for himself and to his own advantage, he possesses with a double affection and he will make far greater efforts to obtain it, than if others besides himself or the whole community were to have it. Ownership according to Hindu Jurists consists in the right of the owner to use the object of ownership at pleasure. It is technically called Yathecchaviniyogar-

hattwa, the right of free disposal by the owner. Ownership is a property indicating of the quality (in the object being owned) of being used according to pleasure. (V. M. 185) and consists of the totality of rights which a legal subject can have over a legal object.

Property (swatwa) has reference to the thing and ownership (swamitwa) to the person. The relation which a thing bears to its owner is called swatwa and the relation which the owner bears to his property is called (swamitwa).

With the growth of commerce and economic activity, there arises different sorts of qualified property which is a means for furtherance of progress and culture. The bailee has such a limited qualified property in the things bailed.

Justice Storey in his famous book quoted Blackstone "In all these instances (*ie* in all classes of bailments) there is a special qualified property transferred from the bailer to the bailee together with its possession. It is not an absolute property, because of his contract for restitution, the bailer having left in him the right to a chose in action, grounded upon such contract and on account of this qualified property of the bailee, he may, as well as the bailer, maintain an action against such as injure or take away their clothes, the bailer, the carrier, the inn-keeper, the pawn-broker, the distrainer and the general bailee may all of them indicate in their own right, this their possessory interest against any stranger

or third person" and commenting on them, says that a depositary has the custody of the thing and no special property. When we speak of a special property in a thing, we mean some special fixed interest in it (*jus in Re*) or some fixed right attached to it, either equitable or legal, distinct from and subordinate to the absolute property or interest of the general owner and therefore he concludes that the depositary had a mere possessory interest alone and no special property.

But we think the arguments of Justice Storey are not tenable. Lawful possession implies some sort of title in the possessor and so we must have some sort of property in the article possessed. It has been said—"There can be no branches without the root. Title is the root and possession is the branch." (Harita in P. M. p 102)

Title is transmitted either by descent or by transfer. In bailment, there is change of possession by agreement of the parties and is thus a kind of transfer. The depositary as well as all other bailees therefore must have some sort of limited or qualified property in the subjects bailed. It may be the right of custody such as that which inheres in a donee after gift but before acceptance, the right for use such as that which inheres in a woman succeding to the estate of her husband.

We find in (V. M.)—Sarkar's edition p. 15) a clear exposition on this point. "But notwithstanding the extinction of the donor's proprietory right consisting in

the capablity of being dealt with according to pleasure, the gift itself being incomplete, in the absence of the effect, namely the generation of another property, the donor who aims at attaining the merit held out by the injunction for gift certainly retains tne right of possessing the subject of the gift till the bestowal of the same on some other fit person." Again in page 56—It is ordained that the property and wealth of the husband devolving, wives have enjoyment for its use"

The bailee also has this qualified Bhogopoyogi Swatwa in some classes of bailment and Rakshanopoyogi swatwa in others. The view of the Hindu Jurists therefore seems to be the correct one and corresponds with that of Blackstone. There can be no doubt that all classes of bailees have some sort of limited property in the things bailed.

Breach of Conditions.

A bailee is not an insurer nor is he liable for accidents but he is at least under an obligation not to use the goods bailed in a manner inconsistent with the conditions of bailment. Section 153 of the Indian Contract Act provides :—A contract for bailment is voidable at the option of the bailer, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Brihaspati says : Whatever bailee procures advantage for himself by the thing bailed, without the

consent of the owner, shall be amerced by the king and made to pay the price of the thing with interest.

The expression without the consent of the owner is determinately meant, Having procured advantage to himself by the thing bailed, without the consent of the owner, if he make it good in another mode, he may be exempted from the payment of interst and from the fine by the forbearance of the king.

The above view of Ratnakara is explained by Jagannath to be that, even if the thing bailed be wasted, the payment of interest and of a fine is not customary, but the value of the chattel only must be made good. Otherwise the text would be trivial because punishment of an offender is a matter of course. (D—II—28-9)

Unauthorised use.

In the same manner, the bailee cannot make any unauthorised use of the goods bailed. According to section 154 of the Indian Contract Act, if the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them. This will be discussed in full in the chapter on deposit.

The text-writers are very emphatic on this point. They all clearly lay down that the trust cannot be

violated by use. An unauthorised use is a crime and such a bailee is liable to punishment.

Yajnavalkya and Narada provide that if without permission of the depositor, the depository uses the dedosit, he should be fined and should pay to the depositor, the value of the deposit with interest.

Kautilya has a similar rule. If the bailee puts the bailment to his own use, he has to pay a compensation which he very expressively calls 'Bhogavetan' fixed according to the circumstances of the case, in addition to a fine of 12 panas. If use by the bailee causes loss or diminishes the value, a double fine had to be paid.

Manner and Method of Bailment

Sir Thomas Strange says in his Elements of Hindu law that the principles of bailment in other codes have been borrowed from the Hindu code. The English law on the point is derived through Bracton from the Romans. There was correspondence and commercial intercourse between the Hindus and the Romans and it would be a profitable study to discover the actual cultural contact between these two Juristic races of the ancient world.

There is an interesting story about Demosthenes which has been used by Sir William Jones in his essay. Demosthenes became an advocate for a person with whom three men had deposited some valuable utensil, of which they were joint-owners and the depository had delivered it to one of them, of whose

knavery, he had no suspicion, upon which the other two brought an action, but were nonsuited on their own evidence, that there was a third bailer, whom they had not joined in the suit, for, the truth not being proved, Demosthenes insisted that his client could not legally restore the deposit, unless all three proprietors were ready to receive it, and this doctrine was good at Rome as well as at Athens, when the thing deposited is in its nature incapable of partition : it is also law, I apprehend in Westminister-Hall. (Jones—vol VIII—279). Knowing of the contact, between the Greeks and the Hindus, one can honestly think that Demosthenes borrowed the dictum of Manu—Yatha Dayasthatha Grahas. [As the delivery, so the recovery.]

A bailment is a two-sided act and the parties to it must be juristic persons. As it is founded on trust and confidence, Manu enjoins that one should select a bailee, who is of good family, of good conduct, well-versed in law, truthful, having many relatives, wealthy and honourable. Medatithi explains that the man must be of very good birth, whose ancestors were learned men, virtuous and of good activities, so that he would be afraid of the least blame or imputation against him and would not therefore use it or employ it, against the conditions agreed on. The bailee should also be a man of good conduct, who is susceptible against the least infamy and should be a man, who is well acquainted with the sense of the Sastras, who was proved

to be truthful in many past cases and therefore who is expected to be so in the future. One who has many friends, relatives and who is favoured by the king's officers, should not be molested by any wicked king because of his power and influence. One who is virtuous and honest in his dealings should not misappropriate the bailment. A prudent man selects such a person.

The conditions generally associated with bailment are given by Manu. (VIII—180 and 194). In whatever manner and for whatever purpose, a bailment is made, it should be accepted on those conditions. As the delivery was, so must be the redelivery.

Generally a bailment should be returned, the same in kind and quantity as it was bailed, by the same and to the same person, by whom and from whom it was received and before the same company who were witnesses to the bailment. He who makes a false statement is liable to a fine.

Medatithi explains that it should be taken as given, if with seal, with seal, if without, without seal, if before witnesses, then so, if not, otherwise. It should be restored in the condition and manner in which it was bailed.

Secret deposits were common and there were intelligent and clever methods for decision of disputes regarding secret deposits. Still the law-givers wanted that bailments should be made openly. Kautilya concludes his chapter on deposits with the text that a bailment

should be made before witnesses, with no secrecy whatever, with full disclosure of details either, with one's own or different people, with full consideration of place and time at first.

The Hindu Smritis give elaborate instructions regarding the drawing up of documents and insists that these are of primary importance in deciding disputes. But as Jagannath says that it was not the practice to draw up documents in bailment, Kautilya therefore gives emphasis that the agreement should be made before credible witnesses.

Methods of recovery.

The methods laid down for recovery of debts apply for recovery of deposits. Manu lays down that the creditor may recover the property by means of moral persuasion, by a suit of law, by tactful management, by customary proceeding and lastly by force. Medathithi explains *dharma* as realisation by instalments and 'vyavahara' as realisation from the profits of a further advance which is invested in some business or work. These methods in these senses are not therefore applicable to cases of bailment. But 'vyavahara' has been explained as a suit of law by Govindaraj and Kulluka and that seems to be the better view. Brihaspati quoted in Kulluka explains 'Dharma' as persuasion through friends and relatives and peaceful demands.

A bailer can recover his deposit by the help of the relatives, kinsmen and friends of the bailee and by peaceful demand and moral persuasion. Failing this, he should go to the law. Trick is borrowing of some ornament or such other article on some pretext and not returning the same, unless the deposit is restored. Customary proceeding is the so called 'Prayopavesana' or 'Dharna' which corresponds to the Traga of the bards. The bailer in this case starves himself to death by sitting at the kitchen-door of the bailee. Medatithi enjoins that trick and fast should not be resorted to without first notifying it to the king. He explains force as the compulsion, used by the king when there is a suit against him. Kulluka however explains the same as threat and force, used upon a debtor, after calling him to one's own house.

Personal force is admissible, for Manu says that a creditor, who himself recovers his property from his debtor, should not be blamed by the king for re-taking what is his own, If the bailee denies the deposit and there is no witness, there is provision that the judge should try to recover it by other means. The procedure adopted was ingenuous and I give a summary from Jagannath's commentary.

If the bailee do not restore the thing, though required by the bailer, let him be sued before the king. The judge should demand it immediately with mild expostulation, without threats. If the bailee,

apprehending the disgrace of a fine or of corporal punishment, which it is the king's duty to inflict and reflecting that he cannot conceal the fact, acknowledge the bailment, he shall restore it with a fine.

If he denies, the judge shall actually deposit gold or precious things, with the defendant, by the artful contrivance of spies and if that deposit is kept and restored as bailed, the bailee should be acquitted. But if the man, knowng the law on this point, acts honestly and if the judge is impressed by the veracity of the claimant, the judge should place spies on all sides of him, who should watch night and day. They should overhear what convasation he makes with his intimate friends at various times and what his occupations are and thereby try to ascertain the truth. The stratagem mentioned by Manu is illustrative only.

Jagannath relates a popular tale which illustrates one of the methods, employed in practice by the judges. A soldier, before he went away to foreign country, put his gold and silver in a jar of oil and placed this with an oilman, asking him to keep the jar of oil for him. The oilman took out the coins and returned the jar, filling it with oil. The soldier, missing his valuables, asked for them. The oilman replied—'This is the very jar of oil which was entrusted to me, take it away. I know not what it contained." The matter went to the law-court. The king asked a man to go inside a chest and sent that chest to the oilman's house

saying that he should decide the dispute, after he gets back the chest in the morning.

At night, he conversed with his wife that he was not a fool to embezzle the king's deposit. He should return the same intact and thereby could be able to appropriate the money of the soldier. The king punished the oilman on the report of the spy, who reported the conversation to him and compelled him to restore the effects to the soldier.

Manu provides a safe guard in the case of sealed deposits. He prescribes that in the case of deposit sealed up, the bailee shall incurr no censure on the redelivery, unless he has altered the seal or taken out something. Kulluka explains that if the bailee did not break the seal and after taking out something seal it up again, he shall incurr no coercion or disgrace. This is illustrated by Jagannath by a popular tale. A rich man placed in the house of a friend, two jars filled with goods. He put lac on the mouth of the jars, after closing them and imprinted his seal thereon. Sometime after his death, his son inspecting his father's notes of his income and expenditure and of the disposal of his property and finding a mention of the deposited jars claimed them. The bailer's son opening both vessels found gold in one and iron pieces in the other. At this, he asked for gold from the bailee for the jar of irons. The bailee replied :—Both jars remain as thy were, marked with thy father's seal ;

I know nothing of their contents. The judges weighed both gold and iron and finding them to be equal in weight, concluded that the other jar was placed probably to verify the weight of gold and thus reconciled the parties.

It is therefore necessary that in the case of a sealed deposit, the seal should be broken in presence of witnesses or the thing should be opened on redelivery without breaking the seal into pieces.

As regards recovery by trick, there is a story in the Jatakas. Two traders were friends ; one of them was from a village and the other was of the town. The villager deposited with the townsman, five hundred plough-shares. The ballee sold them and took the price. He scattered mouse-dung in the place where the plough-shares were, when the villager came, the cheat said—'The mice have eaten these up.' Thereupon he understood and said nothing. Afterwards when he went to bathe, he took his friend's son with him and concealed him in another friend's house and on return said—'The hawk has carried off the boy."

They went to the Lord Chief-Justice who understood everything and said :—

"Well planned indeed ! The biter bit
The trickster tricked—a pretty hit.
If mice eat plough-shares, hawks can fly
With boys away into the sky !

A rougue out-rouged ! with tit for tat,
Give back the plough and after that
Perhaps the man who lost the plough
May give your son back to you now."

Thus the deceitful bailee was outwitted by trick to restore the deposit. (Jataka-Vol II—127)

The above brief discussion of the Hindu Law of Bailment is sufficient to give us an insight into the high cultural life of the Hindus. The law issues commands and prohibitions, the essence of which is not that the rights of the individual shall be preserved but that the original interests of culture shall be promoted. Hindu law bases its foundation of contract on good faith.

As Kohler says :—Good faith must be preserved in all directions, that is to say, the general custom must be interpreted as the declarations of an honest man, without reservations as commonly understood. In particular, it must be assumed that if any one grants something, he also grants everything that is necessary to carry out the first thing and we must be able to depend on it, that whoever consents to anything, will not put obstacles in the other's way, if the latter wishes to enjoy the promised advantages, specially we must have confidence, that if one gives a promise, he will not seek to render it vain by crooked ways and underhand means."

Hindu Jurists attach great value to good faith

and sacredness of promise. Vishnu extols Truth as follows :—

Truth makes the sun spread his rays,
Truth makes the moon shine.
Truth makes the wind blow,
Truth makes the earth bear.
Truth makes the water flow,
Truth makes the fire burn,
The atmosphere exists through truth,
So do the Gods,
And so do the offerings. (V. viii 27-35)

Human beings should therefore be truthful in their dealings and should never break the plighted truth. There is a law of life, the great principle of *Rta* the Vedic sages envisaged, which should be followed steadfastly in human activities. This immutable and immanent law impels, in various ways, mankind to its highest destiny.

The lawyer should bear this in mind and adjust his legal ideas and conceptions in the light of this great philosophy. A study of the Hindu law of Bailment and its comparison with the laws of other races prove the basic unity of human nature. The realization of the ethical ideal is difficult in attainment in practical life but it serves as the best guide and the best factor in compulsory social regulations of human conduct. As is said in Jataka.

"Injured Right can injure surely and requite injury, Therefore Right should ne'er be injured, lest the harm recoil on thee. (Jataka. Vol-III. 273)

CHAPTER IV

Nikshepa.

The two great epics of ancient India—the Ramayana and the Mahabharata have distinct references to Nikshepa. Pandu, before his death, left his wife and children as a Upanidhi with his brother, Dhritarastra. Bharata took the sandals of Rama as a Nyasa. These have no direct bearing on law. But as Jawaharlal Nehru says—'Most of the myths and stories are heroic in conception and teach adherence to truth and the pledged word, whatever the consequences, faithfulness unto death and even beyond, courage, good works and sacrifice for the common good :—The Discovery of India—P. 105.

Narada defines Nikshepa as follows :—"When a man bails any of his effects to another, in whom he has confidence and from whom he has no doubt of receiving his property again, it is a deposit, which the wise call Nikshepa. (Vy. M—73)

Sir William Jones defines a deposit to be a naked bailment of goods, to be kept for the bailer, without reward and to be returned when he shall require it. Storey includes bailment for delivery to others and says that it is a bailment of goods to be kept by the bailer without reward and delivered according to the object or purpose of the original trust.

Storey's definition is wider and includes the four classes of bailments, known in Hindu law, as Nikshepa, Upanidhi, Nyasa and Anvadhi. We accept the definition of Sir Jones and shall discuss the first three classes in this chapter,

The general name for these classes of deposit is Nikshepa. If may be either necessary or voluntary. It is necessary, when it is made on a sudden emergency and is confided to any person with whom the depositor meets, without any opportunity for reflection or choice. It is voluntary, when it is done out of freewill and choice, without there being any compulsion.

Vyasa says that when a man on account of his necessity to leave the place or through fear of king or for the purpose of deceiving his heirs, gives his property to another person, it is called Nikshepa in general. (S. C 415). Vyasa's text covers the case of emergeney deposit. A voluntary deposit arises from mere consent and agreement. In such a case, the bailer should make the deposit, after careful examinatiou of the place, house, householder, his caste, his many qualities veracity and kindness. (Brihaspati in S. C. 415) and he should therefore select a man, who is, in the words of Manu, of respectable family, of good character, pious, truthful and who has a large family for confiding the deposit.

The distinction between Nikshepa and Upanidhi is this ; that in Nikshepa, the bailee knows the nature,

quality, quantity form etc of the deposit, made over openly to him, at the time of bailment; while in Upanidhi, it is given to the bailee enclosed in a box, under seal, without disclosing the nature of the article bailed. Nyasa technically means a deposit which is handed over not personally but to a relative or agent of the bailee, with the request that it should be handed over to him when he returns.

The rules applicable to one class apply mutatis mutandis to other classes and vice versa. In the law of deposit, the rules of decision are generally dictated by reason and good sense and determined by the plain maxims of equity and justice, so it is nothing strange that they are almost all alike in all the countries. But the wonderful subtlety and keen sagacity, shown by the Hindu jurists are unique and admirable examples of forensic ability.

Classes of Nikshepa.

Mitakshara cites Narada and explains the difference between Upanidhi and Nikshepa. 'When a thing is deposited under seal, without mentioning its quantity, if its kind and form be unknown, it is considered as an Upanidhi but the wise call a specified deposit Nikshepa. In Upanidhi, the depositary, who is called 'Dharanaka' or Nyasadhari, does not know whether gold or silver or what has been kept by the Niksheptwa. It is also

secured by a private knot to prevent it being taken by another person or secured by the impression of a seal on which particular letters are engraved. In Nikshepa the quantity, kind and form are known, The distinction is evident and it is not similiar to the difference between a Brahmana and a mendicant as explained by Kulluka Bhatta.

Nikshepa, Upanidhi and Nyasa—these three words are however very often used in the general sense, overlooking its particular and technical sense.

Kautilya uses Upanidhi as a general term, so does Katyayana. Kautilya does not know the term Nikshepa, but both the terms are known to Manu, Jajnavalkya, Brihaspati, Narada and Katyayana. Brihaspati defines Nyasa as follows : when anything is carried and placed in the house or on the ground of another, notice being given to him by the owner, who has fear of the king or of robbers and the enemies or who wishes to deceive his heirs, it is called Nyasa. (D-II-6). Chandeswar says that the bailee is not responsible, if it is lost, when the deposit is made without the knowledge of the bailee. Brihaspati includes Upanidhi within Nyasa by the next verse : And when a thing, enclosed in a box is placed without mentioning its kind, form or quantity or without showing the thing, it is Upanidhi.

But the term Nyasa has been technically used by Mitakshara, Smritichandrika, Vivadaratnakarna and

Viramitrodaya to denote a deposit which has been handed over not personally to the depositor, but in his absence, to his son or other relations, with the request that it should be handed over to him, when he returns home.

According to Mitakshara, Nyasa is the delivery of a thing into the hands of a person belonging to the depository's family, with these directions—'give this to your master' and such a delivery occurs in the case of open and of sealed deposits but Brihaspati expressly declares it, in the cases of open deposits.

Jajnavalkya says—The Law of Nikshepa applies to a loan for use, a deposit for delivery and a deposit made in absence.

Narada says—This very law is enacted for loans for use, deposits for delivery and the like, deposits with artisans, bailments in absence, mutual deposit and guardianship of a rich minor.—These are the six classes and deposit.

If a man privately receive a fine or a valuable chattel, the law is the same in that case also.

Brihaspati says—This is the law in bailment for delivery, loan for use, deposit with an artisan, pledge and persons seeking refuge. Silpinyasa and Anvahita will be discussed in the chapters on Hire and mandate, for they include them. Sir William Jones define Mandate to be bailment of goods, without reward, to be carried from place to place or to have some act

performed about them. When the same is done for reward, it turns to be a hire. Of the others, Adhi and Yachitaka are discussed in separate chapters, the rest are included in this chapter.

Chandeswar says when a man privately receives a fine, as there is no evidence of his levying the fine, this very rule is applicable and also when a man privately receives a valuable chattel, since there is no evidence of the receipt. Consequently if a man, to expiate a very infamous crime, accidentally committed, pay a private fine to the king, through a public officer, and that officer acting fraudulently deny the payment of the fine or if the king's officer assert that a fine has been paid, though none have been exacted, this very rule is applicable, namely the rule declared for deposits and if a man privately receive back a loan, a deposit or the like, which he had himself given and subsequently deny the receipt, in that case also, this very rule is applicable. (D-11-10)

Halayudha says that if a man accepts an infant with valuable effects, a deposit arises.

Pratinyasa is mutual deposit. Devadatta entrusts his property with Chakradatta and he entrusts his own with Devadatta. But Vyavahara-Mayukha makes it a deposit by Devadatta to Chakradatta and by him to a third person Charudatta.

Misra and Bhavadeva include a pledge transferred within the law of deposit.

The subtlety of the Hindu Jurists will appear from the following discussion of Jagannath (D-11-4).—"Does not the sense ascribed to Nikshepa, comprehend pledge or the delivery of a pledge? It may be so: a deposit does arise in a pledge and the like. But when it is questioned whether a deposit or a pledge shall prevail, deposit different from a pledge is intended; in like manner as one name of kine denote cattle of that sort and a synonymous term in the same sentence may intend cows only."

As said before, Nikshepa means both the act of delivery as well as the article delivered.

Nikshepa again may be simple or sequestration, the former is when the deposit is made by one or more persons having a common interest and the latter is when bailers have adverse interests in controversy touching it. The latter is of two kinds :—first conventional—made by agreement of parties, second, judicial, as are made by orders of the courts. In all these cases, the depository is mere stake-holder and shall deliver to him who is adjudged to have the right. Sequestration arises in the case of Pratibhus. Suretyship was a recognised affair in Hindu law Manu says (8—162)—If the surety had received money and had thus enough property, then on his death, his heir shall pay the debt.

Katyayana lays down :—If a man had stood bail for appearance after taking some properties by way

of pledge from the debtor, then in the absence of the father, the son should pay the debt. (V. R 43) Smritichandrika extends this rule to surety for trust also. (s. c. 533)

Smritichandrika is very particular on the law of sureties. It asserts on the text of Vyasa that in the absence of documents and ordeals, there should be five kinds of sureties—for payment, for trust, for appearance, for the return of the delivered pledge and for delivery of the assets of the debtor. The surety in the case of pledge is called Adhipala and he used to keep it, till disposal of the suit. Other Pratibhus were known as Bhunjapaka and Pratyarpaka.

Katyayana's Vada-Pratibhu was surely a judicial sequestrator and was taken from the litigants for the due carrying out of the decretal order.

Life in ancient days was corporate and communistic. It did not suffer from the extra individualism of modern days. The system of suretyship therefore served a very useful purpose in society. Suretyship was at first a liability of the person. It was not an obligation of debt but a personal intervention, so suretyship expires with the surety, unless he has got valuable consideration in the shape of deposit. In the latter case alone, his rights and liabilities are determined by the laws of deposit.

Liabilities of the depository.

The bailee receives no reward for his troubles, but still resonable care and perfect fidelity are of the

essence of the confidence reposed. Brihaspati therefore discourages acceptance of a deposit, but says at the same time that if accepted, utmost care is to be bestowed for earning religious merit by the act. But Jagannath in (2 D-456) adopts the fiction of English lawyers and says that to him, who attends cattle as a favour, even the favour conferred by him is his hire and he is then responsible for the loss. By an analogy, the favour conferred by a man in keeping a deposit without reward is the consideration for which he must take care. I have already discussed that Hindu law makes no fine distinctions in care. But a text of Vyasa seems to make some sort of distinction. Vyasa says :—For a thing voluntarily wasted, the bailee shall be forced to pay the price with interest, for a thing neglected the value only, for a thing lost through slight inattention, something less.

Jagannath comments :—When the owner, having bailed a thing, demands it at a distant time and the depositary cannot redeliver it, he shall be compelled to make it good with interest. Waste is not exclusively intended ; but any advantage, which the depository procures for himself by the thing bailed, is fully meant, hence the sale and other embezzlement by the owner is comprehended in the precept." (2 D-28) On a logical analysis, the distinction can be explained away. No reasonable man voluntarily wastes his own goods, so the bailee is to pay interest in such a case.

Neglect is not reasonable but it happens, so he must pay the price. A slight omission admits of excuse so something less is provided. But be that as it may, the other law-givers make no such distinction and the measure of care is what he takes of his own goods and so in case of loss, along with his own goods, the bailee is not liable except for fraud.

A depositor is not also liable in cases where less occurs by powers beyond the control of the bailee, such as fire, flood, piracy, shipwreck, revolution, invasion, robbery. theft or an wanton act of an oppressive king. If the loss is for a *Vis major*, the depository is not liable unless he had acted fraudulently.

Appropriation or use by Bailee.

The bailment is gratuitous but this does not give the bailee any right to make any use of the article bailed. If any one does so, he commits breach of trust and there are strict provisions for such a wrong-doer. Loss or destruction of the deposit may arise from these causes—(i) The bailee may have consumed the deposit, (Bhakshita) (ii) he may have neglected it, (Upekshita) (iii) he may have caused it to be lost though mistake, (Ajnananasita).

Vishnu says—He who appropriates a deposit shall restore the commodity, deposited to the owner, with interest. The king shall punish him as a thief. (V-5-169-70). A commodity sold but not paid is in

the nature of a deposit and Vishnu provides that he who does not deliver to the purchaser, a commodity sold after its price has been paid to him, shall be compelled to deliver it to him with interest. And he shall be fined a hundred panas by the king. (V-5-127-8). The law was severe to the misappropriator and he was condemned as a thief.

Manu ordains—'The man who appropriates a deposit but does not return it and the man who never made any deposit but claims it, shall be tested by oaths, ordeals and other methods and both shall be punished as thieves or be compelled to pay equal in value to the deposit as a fine. Commenting on this, the Vivadaratnakara lays down that if the property retained is valuable, then alone should the punishment of a thief be inflicted. In the ordinary case, he should be fined, but in both cases he must restore the deposit.

Manu continues—The appropriator of a deposit shall be fined a sum equal in value to the deposit and in like manner, he who retains a sealed deposit, without making any distinction, (M-190-192).

Manu provides two alternative punishments for one who fails to restore a deposit—corporal punishment and fine equal in value to the deposit. Medatithi says that it should be determined according to the caste of the accused. A Brahmana should not get corporal punishment. A bailee other than a Brahmin may get either of them. But by this text (M. 8—192), the

punishment is restricted to fine only, so only admonition or reprimand may be added to the fine.

Matsyapurana provides double the value of the object as fine. "In cases, where the depositor does not restore a deposit and when one claims without making the deposit, both should be punished as thieves or fined double the value of the claim."

The punishment of a thief is provided by Manu. (8—193). He who by false pretences or fraud obtains the property of another shall be punished together with his accomplices by various degrees of corporal punishments, (*ie* by cutting off his hands. feet or his head or by decapitating or impaling the offender or having him trampled to death by elephants and so forth.)

The digest-writers reconcile these texts by directing that fine should be equal to or double the valuè of the deposit, according to the character of the bailee, the quality and quantity of the deposit and to the fact whether it is the first or second offence. If the deposit consists of gold, gems or pearls and if the quantity be large, he shall get the punishment of a thief and pay double the fine. In the case of a trifling demand, the bailee shall pay fine according to the value of the good, if his general conduct be good, but double, if his morals be not good.

For a first offence, the fine should be equal to the value, but for a second offence, the fine should be double.

The corporal punishment should be inflicted according to the facts and circumstances of the case.

Appropriation was an offence, but use, if not an offence of the same degree, was also severely condemned.

Narada says :—If without the permission of the depositor, the bailee uses the deposit, he should be fined and made to restore the deposit with interest.

Yajnavalkya says—The bailee making his living without authority by the use of the deposit shall be punished and made to pay it with interest. *Ajivan* of the text has been explained by Nilkantha as living by using it or letting it out at interest. (Vy. M 73)

The prohibition is the result of the ancient regard for promise. A promise made was an enforceable obligation according to the legal conception of the Hindus, whether any benefit accrued or not to the promisee. The use contemplated may be spending out of it, enjoying it or investing it in profit. The bailee should be fined in proportion to the enjoyment and use and he must be compelled to restore the deposit with profit.

The use contemplated is unauthorised use. There would evidently be no liability where previous permission has been taken for use. The extent of profit is thus determined by Katyayana. A deposit, the balance of interest, a commodity sold and the price of a commodity purchased, not being paid after demand, shall bear interest at the rate of 5 p. c. (2. D-29).

Measures of compensation varied in cases of consumption, neglect and mistake.

The text of Vyasa in S. C. 421 and V. M. 364 is said to be that of Katyayana by Vijnaneswar in the Mitakshara. It says—If the bailee enjoys the deposit, he shall pay the price with interest, in case of neglect, he shall pay just the value and in case of loss, through mistake, he shall pay a little less, which is a discount of one-fourth according to the Mitakshara. The interest is payable when there is damage by the loss. Consequently if a stone or the like, bailed without seal, be used for three or four days, it shall not be restored wlth interest

An interesting enquiry is whence a deposit should bear interest, whether from the date of the deposit, or from the date of use or waste or from the day of the demand. Jagannath on the basis of Katyayana's text 'If a man purchases a commodity and then fraudulently goes to a foreign country, without paying the price of it, it shall bear interest after three seasons or six months, says that interest shall run from the date of deposit.

Some hold that it shall run six months after the date of demand, others hold that since waste is the cause of bearing interest, it should commence from the day of the waste.

These liabilities may appear rigorous but they are based upon the principle of fair conduct and good faith towards others and the natural and rational sense of justice and equity.

Liability Personal.

The liability to loss and use is personal. The heirs of the bailee were not held liable. Katyayana says that he, who uses, neglects or unconsciously spoils any deposit and so forth shall himself pay for it. His sons and other heirs, who were not concerned in injuring it, shall not be responsible. Goutama confirms this by saying that the necessity of making good a deposit, a thing bailed for delivery to a third person, a pledge, or a thing borrowed or hired and the like, if destroyed by the fault of the bailee shall not fall on his heirs, if they were free from blame, but it falls on the bailee by whose fault, the thing was destroyed. (V. C.-55).

Brihaspati also says—If the property of another, bailed by the mode called Nyasa and the like be consumed or neglected and lost even without design, the bailee himself is the man, who must make them good. It implies that his son, wife or other heir is not liable. But if the loss is by the fault of the heir, he is liable.

Jagannath, though conscious of the fact, that there is no text to support him, opines that a deposit, consumed by the bailee, amount to a debt and as such, the heir would be liable.

Alienation by bailee.

Neither a gift, a sale, nor any other alienation, by the bailee is valid in law, for he has no right of property in the bailment. Brihaspati says: He who fraudu-

lently or secretly sells an open deposit, a bailment for delivery, a sealed deposit, effects stolen, a pledge or a thing borrowed for use, a bailment to an artist or the like, sells without ownership. (V. R. 100).

Daksha says (S. C. 443)—Common property, a loan for use, a bailment in absence, a deposit, a pledge, wife, wife's property, a bailment for delivery, and the entire property, if there is offspring,—these nine have been declared to be incapable of gift, even in times of distress.

In the case of investment, if it is lent with permission, the gain and the loss are of the depositior, one should not lend without permission of the bailer, but if it is done inadvertently, the gain is the owner's, for he only has property in the thing and the bailee, like a box or the like, is merely the holder of the deposit.

It the loan be lost by the death or insolvency of the debtor, the deposit must be made good by the bailee, since it was lost by the fault, committed by him in lending it. This is what Jagannath says in his commentary about lending of a deposit and this is a sound view.

The bailee is bound to keep the same care, even if the article bailed is stolen, for a thief, according to the opinion of some Smriti-commentators have a property in the effects stolen. So he cannot give it away even to the rightful owner.

A bailment is a property kept in trust and so it cannot be sold, pledged or given or transferred in any

other way. Such alienation is invalid and in cases of alienation, the bailee is to be fined. Kautilya provides that in case of wrongful alienation, the bailee shall restore four times its value and shall pay a fine five times the stipulated value. (Kau—Bk. III—178)

In case of exchange, however, Kautilya says that its value only shall be paid.

Restitution of deposit.

As to the restitution of deposits, the law is that it should be returned individuo and in the same state in which it was received.' Manu says (8.180 and 195) 'one should return the bailment in the same form and manner in which it is bailed, for as delivery is, so the recovery and further, when a trust has been created privately and accepted privately, then it should be returned in private. This is explained by Vivada-ratnakara. If the deposit was delivered openly, it should be restored as an open deposit, if it was delivered sealed, it should be restored sealed, if it was delivered before witnesses, it should be restored before witnesses ; if it was delivered by the bailor singly, it should be returned to him singly, if it was delivered by the bailor along with others, it should be to the bailor along with these others.

Brihaspati has a similar rule. The depository should return the deposit exactly in the manner it was entrusted to him, in the same way and to the

same person, it should never be restored to the depositor's next of kin (son and others). Manu also says the same thing. An open or a sealed deposit must never be returned to a near relation of the depositor during the latter's life-time, for if the recipient dies without delivering them, they are lost, but if he does not die, they are not lost. Vivadaratnakara opines that if the bailor who is alive, happens to be absent, the depository should not hand over the deposit to the son, mother, wife, or any other next of kin, for if these latter go away and the bailor demands, the bailee will have to make it good again.

Narada declares : deposits again are of two kinds, with or without witnesses. The restoring also should be with or without witnesses respectively. (V. C, 50). If there has been mutual deposit, the return should be mutual.

Jagannath in his commentary extends and illustrates the law of restitution very carefully and intelligently. Restitution to the next of kin is illegal, because if the owner does not get it, he may sue for it. But there is no harm, if the delivery is before witnesses, who can testify about the payment in case of a contest. If the son manages the affairs of the father, there is no offence in redelivery to him. But a deposit expressly bailed to deceive a son, must on no account be given to the son, while the father lives, without his directions.

Chandeswar says that the son has no dominion over paternal wealth, so long as the father is alive, his receipt of the deposit is not valid, as is declared by Harita. If the son dissipates it without permission, the depositor shall recover it from the bailee.

A distinction is made between the redelivery of a deposit and of a debt. Debt can be paid to the next of kin, for the debtor may want to get back the pledge in case of a pledged debt and he may want to be relieved of the sin of debt. But there being no such obligation, nor necessity, the owner may say—'on what consideration did you give back the deposit in my absence' consequently a deposit voluntarily received, must be kept until the depositor return.

Manu says—If a bailee returns of his own accord the deposit to the near relative of a deceased depositor, he must not be harassed for it, either by the king or by the kinsmen of the deceased.

Smriti-chandrika adds comments. The bailee shall not return the deposit before expiry of the stipulated time, unless he is asked to do so. If the depositor has left several heirs, the deposit shall be returned, in presence of all of them. (S. C. 424).

In the event of the bailee not restoring the deposit, the heirs on bailer's death, should try to secure it by friendly means, without recourse to artifice or after inquiring into the conduct of the bailee, they should settle the matter by gentle means. (M. 8-187).

Vivadaratnakara adds that if the bailee is not honest in his dealings, the heir shall adopt artifices and other strong measures. (V. R. 94'.

Smriti-chandrika provides that on the death of the bailee, the person to whom the possession of the deposit passes, should return it to the depositor. (S. C. 424).

The time for restitution is after the expiry of the stipulated time,

Katyayana says—A deposit shall be recovered at the stipulated time, but let the owner leave it until the period expire. When that does expire, if the bailee does not return the deposit, he shall be compelled to pay double the fine.

A bailment may be for stipulated periord or for unstipulated period. Jagannath adds whatever fine, for whatever kind of property has been declared in the case of a thing bailed without stipulation of period, double that fine shall, on this authority of this law, be paid by him, who does not restore at the stipulated time, a thing of a similar kind which has been bailed for time. It follows, that, in the case, where the fine is ordined at double the value of the thing bailed, he shall pay four times the value, if it was bailed for a time.

The provisions bear the air of primitive simplicity but are not to be ridiculed on that ground for these are very reasonable and practical rules.

Methods of recovery

Vyasa says that if a man, on the strength of his relations, denies a deposit, it shall be proved by evidence or by ordeal and then the man should be made to restore it. (S.C. 421). As deposit was very often given in secrecy, ordeal was deemed a necessary mode of proof., for otherwise there would be no remedy in most cases. The consciousness of guilt or innocence was an important factor in these divine tests and these, bringing out the psychic emotion of the suspects, enabled, in many cases, the judges to arrive at correct judgments. According to Smritichandrika, the man should merely restore the deposit or pay its price without having to pay anything by way of fine or interest.

But Brihaspati provides interest, If a man denies a deposit and it is established by evidence or oaths, he should restore the deposit and should also pay a fine equal in value to the deposit.

If an attested deposit is denied, let the king, ascertaining it by the evidence of competent witnesses, compel him to restore it and ascertaining by ordeal a thing privately bailed, let him compel the depositary to restore it. On the authority of the text of Yajnavalkya (on failure of each of them, ordeal is ordained in each case), proof by ordeal is admitted by the author of the Mitakshara on failure of evidence.

Manu prescribes a tactful method for the discovery of the deposit. "He who does not return the deposit

to the depositor on demand, may be tried by the judge in the depositor's absence. On failure of witnesses, let the judge actually deposit gold with the accused under some pretext or through spies of proper age and appearance and then demand it back. If he admits the deposit exactly in the form and shape in which it was bailed, then there is nothing in the charge brought against him by others. If however, he restores not that gold in the proper manner, he shall be forced to restore both, such is the settled law .(M-8—181-4)

Kautilya develops the procedure enjoined by Manu. He has similar rules for taking recourse to artifices for the ends of justice which were necessitated for protection of unwary people, against the wiles of dishonest bailees.

The first method was to station a few persons in secret in some part of the bailee's house but within hearing and to send the plaintiff bailor to demand the article back from the accused bailee. If is very likely that during the conversation that may ensue, there may be disclossure of the truth and the evidence of witnesses stationed under wall (Gudabhitti) with the sanction of the court would be considered by the judge in determining the case,

The second dodge is to employ a spy, who in the guise of an old and afflicted person appears before the defendant bailee as if he has come after a long journey in a forest or as if he is one about to go out on a long

and perilous sea-voyage and entreats the bailee to accept some valuable chattels, containing secret marks which he naturally accepts. After a time, he sends his son or brother for the sealed deposit. If the bailee does not quietly return it, he shall not only forfeit his credit, but be liable to the punishment for theft, besides being made to restore the deposit.

The third stratagem is to send a spy in the guise of a respectable man, as if bent on renouncing the world and becoming an ascetic, who leaves a deposit with the defendant. After a while he returns and asks for return of the bailment. If he dishonestly denies it, he is made to restore both the deposits and is also punished for theft.

The fourth trick is to send a spy, who pretends to be a simpleton and asserts that he is afraid to carry a valuable thing through the streets at night lest he be captured by police for prowling at night and thus requests the defendant to keep it for a time. Subsequently, he is as it were put into jail. When he asked for the same, if the bailee denies, the same result follows.

The fifth way was the employment of a spy, who deposit a sealed article and goes away imforming the defendant his place of journey. Then a man of his family goes to the house of the bailee, recognises the article and asks for information of the bailer and for delivery of the bailment. If the custodian denies either, he is treated as before.

In the case of denial of deposits, the antecedent circumstances of the deposit, the character and social position of the bailee are relevant matters of evidence, so in all these cases, it was deemed of great importance to enquire how the property under dispute came into the possession of the party. What are the circumstances connected with the various transactions, concerning the property and what was the social and financial position of the parties.

The artifices enumerated above were adopted on the principle that the honesty of bailee in the second transaction would be an index of his truthfulness and integrity in the first. Though this does not follow as a corollary, the devices for testing the honesty, we may believe, served their purpose in most of the cases.

Kautilya says that the artisans are very clumsy people. They are incautious and make deposits without any oral or documentry evidence whatsoever. Kautilya gave the judges this executive authority of employing detectives for finding out the real truth. The dodges were employed as measures of relief for careless people as well as safe-guards for cases when deposits were made in emergency and hurry, without observance of necessary precautions.

The methods adopted may seem to us crude and archaic. Though not very happy methods from the point of practical administration, they show the zeal of the ancients to do substantial justice in all cases

and judged from this higher standard of giving every man his due, they would surely appear as very laudable and lofty measures.

If the plaintiff fails to bring evidence, the modern judge feels no hesitation on dismissing the suit, and leaving the poor man to his fate. He does not feel any moral compulsion like his ancient prototype to discover the truth by all means and give necessary reliefs whenever and howsoever possible. The fact that the system of espoinage is found in well-developed form in Kautilya is another proof of the assertion made by me in the introduction that Kautilya is posterior to Manu and Yajnavalkya.

Rights and duties of the bailor.

The bailor must and should disclose the defects in the goods bailed, of which he is aware. This is deducible from the text of Katyayana in Smriti-chandrika. He, by whose fault anything is lost or damaged, shall pay that thing with interest, unless it is by an act of God or the king (S. C.—419). The bailor is liable when for the fault of him to disclose, the bailee is involved in extraordinary risks and suffers damages.

The bailor has the right to get back the thing bailed, even though he be not the actual owner. The expression 'Pratyanantara' is explained by Mitra Misra to be the real owner of the thing following

Smritichandrika and it is laid down that the bailment cannot be restored to any person other than the bailor, although he may claim to be the owner. The bailee is estopped from denying the title of the bailor. On this analogy, Jagannath says that the bailment made by a thief should be made over to him, though he personally does not favour the view.

A bailor has the right to get back his deposit on demand (M-8—187). This is when no period was stipulated. He has the right to get it back after the expiry of the stipulated period. Ratnakara, commenting on a text of Katyayana, says that the bailor shall recover it, when the period is elapsed and not before (2D—38).

It is said in Vyavahara-mayukha on the text of Katyayana that if after completion of the work or the expiry of the stipulated time, the bailee does not return the deposit even on demand, he shall pay the value of it, if it is lost or stolen (Vy. M.-74).

Mr. Sen in his Hindu Jurisprudence says that the bailee is ordinarily free to return the deposit even before the bailor demands as it is a gratuitous bailment. This is not warranted by the texts. The text of Katyayana is against his view. If a bailee has taken a thing for a special purpose or for a stipulated period, then he should not be made to restore it, before the purpose is served or before the lapse of the fixed time even on demand. (S. C. 427).

As is the law of debt, a deposit should be returned, when demanded, if there is no agreement as to time and after the lapse of the specific time, when so covenanted, but he may receive back sooner with the consent of the bailee. The bailment of deposit is gratuitous but the bailee cannot therefore return the bailment, whenever he so desires.

Mr, Sen himself adds—"Where the deposit was made out of fear for some anticipated danger, return it not until the danger is over. Such a return is called premature and the bailee who makes such a return against the wishes of the bailor, renders himself liable to be punished with a fine, if in consequence, the bailor suffers any loss."

There is a direct text of Katyayana. The bailor shall receive back the deposit only at the proper time. Avoid delivery at the wrong time. If the bailee restores it, at the wrong time without being asked to do so, he should pay a fine which is double the value of the deposit.

Smriti-chandrika explains that the acceptance should be at the time fixed by the parties. Vivadaratnakara says that it was after the passing of the danger out of which fear the property was bailed. If the bailee returns earlier, he does it, out of sheer wickedness and consequently becomes liable to punishment. (V. R. 93).

The deposit is a legal transaction recognised for the convenience of the depositor. The law cannot therefore ignore his conveniences and inconveniences,

even though the baliee gets no reward for the care and trouble taken by him.

The bailor has the right to get back the exact quantity of the exact quality. As Manu says: If a deposit of a particular description or quantity is bailed by anybody in the presence of a number of witnesses, it must be held to be of that particular description and quantity, the party who makes a false statement is liable to punishment.

The bailor has the right to pursue his deposit in the hands of the purchaser, pledgee or any other kind of transferee.

Narada says—When anything has been sold by a person who is not the owner, the rightful owner should obtain it from the purchaser and Yajnavalkya adds that the purchaser would be to blame if he cannot produce the vendor.

The law is fully illustrated by Katyayana: If a man discovers his chattel in the possession of some one else, the claimant must prove his ownership by evidence. The buyer then must prove that he is a bonafide purchaser for value. For this he should produce the seller. If he cannot be found, he shall prove by credible witnesses that the purchase was open and public. Yajnavalkya gives the depositor the right of arrest. When a man discovers his chattel lost or stolen, the owner shall get the person in possession arrested by the king's officers but if the exigencies of time

and place lead him to believe that he would abscond, he should arrest and hand over the man to the king.

Manu provides that if a sale or gift is made by one who is not the rightful owner of the property, it should be annulled, (M. 8 199), so that the bailor can recover his deposit from the purchaser who buys it from the bailee. So that in such a case, the text of Yajnavalkya (2. 170) would apply and the purchaser could get his price, the owner his deposit and the king a fine.

The bailor cannot however claim the property when the bailee is dead and the deposit is lost by inevitable accident. Kautilya says that a deposit should not be sued for when the bailee is dead or involved in calamities. It is explained however that the bar does not apply when the heir inherits the property and when the deposit is not lost by the calamity.

But what is held by one as pledge can be given away only as pledge. Accordingly the gift of the pledge or deposit may be made in this form—'I am holding this property as a pledge or a deposit. You also may keep it as a pledge or a deposit and restore it to the owner on the same conditions as exist between him and me. Smritichandrika provides that a deposit may be given to another as a deposit (S. C. 443).

Mutual deposit.

Manu enjoins (8.195). that things, mutually deposited should be mutually restored by and to the

person, by and from whom they were received, as the bailment was, so should be the delivery. Jagannath comments :—"Devadatta entrusts a thing to Yajnavalkya and Yajnavalkya entrusts a thing to Devadatta, having been mutually received, the things should be mutually restored. One cannot alone receive his own property, merely because he delivered his own property. If one say—let my chattal remain with thee and the other also say—"let my chattel remain with thee" it is a mutual deposit. If one say "let thy chattel remain with me and my chattel with thee, it is a mutual receipt and delivery and if some person, seeing that another is unable to protect his property from robbers and intending to confer a favour say "let thy chattel remain with me and if he, desirious of returning the favour, say 'thou hast many chattels of small value, let them remain with me, it is a mutual deposit." (2 D—17)

This is illustrative. There may be mutual deposits in other manners also. The rights and liabilities are the same as in ordinary deposit.

No adverse possession.

Neither a pledge nor a deposit can be lost by lapse of time. They are recoverable, though both have remained long with the bailee (M—8-145). Medatithi however advises that one should not in practice put a pledge or deposit for long time, because

if left over for a long time, they would be liable to appropriation.

Yajnavalkya provides that a pledge, a boundary, an open deposit, the property of an idol and of a minor, a sealed deposit, the king's property, the property of women and the wealth of a Srotriya are not lost in consequence of adverse possession. (7. 2. 25).

The period in which one acquires tittle by adverse possession is 20 years as laid down by him (Y. 2. 24).

Mitakshara explains that in these cases, there being no possibility of any fault of the owner, the property cannot be lost by adverse possession.

No interest for deposit.

As a matter of principle, deposit carries no interest. A commodity, the price of a commodity bought, wages, a deposit and the like, a fine to the king, a thing clandestinely taken without a design to steal it, wasteful gifts, stakes, carry no interest unless stipulated for. (Vy. M. 66). There are texts of Vyasa and Samvarta to the same effect and these have been quoted in the digest.

But the privilege ceases when the bailee does not restore even after demand. And Katyayana provides that it should be at the rate of 5 p. c. if the deposit is not returned on demand.

The story of recovery in Rajatarangini.

We get a picture of the actual application of the law of deposit in Rajatarangini. The king displayed

great ingenuity and subtlety in deciding a dispute over a diposit. The king is called Uccala and the story is to be found in the 8th Taranga of the book. A rich man had great friendship with a merchant and confided with him a lakh of Dinars as deposit. After deposit, he used to take money as occasions would arise for meeting necessary expenses. On the lapse of about 30 years, the rich man demanded his deposit back from the bailee. Kahlana has a very bad notion about the merchant class. He says that the merchants are cruels like tigers, that they speak soft and sweet and hide their wickedness, but the innate knavery is out when there is any quarrel. The merchant withheld payment on several pleas, with a fraudulent motive of misappropriation, the merchant produced a a false and long list of fictitious withdrawals and asked the rich man to repay the same with interest. Thereupon the rich man went to the law-court. The judges were at a loss and could not decide the matter, so they referred the matter to the king, The king heard the parties and hit upon a plan. He asked the merchant to show the deposit-money. When the merchant brought the jars, the king examined the coins and found out that there were several coins of his own. He thereupon exclaimed—"Do the kings make coins in the name of future kings. How can the deposit made at the time of my predecessor, Kalansha, contain coins of my time." The merchant

could not give any answer. The king thereupon decided that the merchant surely had used the money in deposit and he should therefore pay interest upon the deposit from the date of bailment to the date of the suit and the plaintiff should pay back with interest the loans which were proved to have been taken by him.

The king, it is seen, decided upon the well-laid principle that a bailee who uses the deposit without consent of the bailer is liable to pay the principal with interest.

In Bhasa's Svapnavasavadatta, there is a reference to the law of deposit also. Yaugandharayana, the wily minister of Udayana introduces Vasvadatta as his sister to Padmavati, the would-be second wife of the king and keeps her as deposit with her. The chamberlain forbids Padmavati to agree saying that it is easy to part with wealth, with wife, and with ascetic power. Everything else is easy to do but it is difficult to guard a deposit. In the last scene, when the minister appears to claim back the deposit, the king says that a deposit should be rendered back in the presence of witnesses and adds that his honour the noble Raivhya and her ladyship would form the tribunal.

Quasi deposits.

The finder of lost goods had responsibilities of a bailee and such a finding may be called a quasi-deposit.

Lord Coke in a famous judgment deccared : "If a man finds goods, an action on the case lies for his ill and negligent keeping of them but not for trover or conversions because this is but a nonfeasance. A finder is not under compulsion to take goods, but it he does undertake the custody, he ought to exercise reasonable diligence in preserving the goods.

Goutama enumerates the lawful modes of acquisition of property and includes finding as one of it. But then the finding must be of unowned things. One does not acquire property in a lost article by Adhigama. The law was that the finder should place it with the king who should try to find out the real owner by beat of drums and proclamation. He should preserve it for three years but if even within this time, the owner does not appear to claim, the king shall escheat it. If the owner come and claim it, he must prove his ownership by accurately describing its shape, the number of articles, the time and the place where it was lost, the colour, shape and size and if he can establish his title, he shall get back the property but shall pay a commission to the king, the rate of which varied from one-sixth to one-twelfth.

According to Katyayana a commodity sold but not delivered is in the nature of a deposit. Yajnavalyky's text is as follows—If the seller, receives the price but does not deliver the articles sold to the buyer, he shall deliver if with interest if the buyer is a trader of the

same place ; but with the amount of profit which he could have made in his own country if he is a foriegn trader.

In such a case of quasi-deposit, the bailee is also liable for loss. Narada says—If the article happens to be injured or destroyed by fire or carried off, the loss shall be charged to the seller who did not deliver it after sale (V. E. 192).

Such a bailee is not protected against acts of Gode or the king. If any damage is done to the article sold through an act of God or the king, the loss belongs to the seller, who did not deliver though asked to do so.

But if the article sold is not accepted by the purchaser, the bailee can resell it and he shall recover any damage that he may suffer because of fluctuation in the market. The seller becomes a bailee when he accepts the price, otherwise no blame attaches to him. But such a bailment occurs even without payment of price, when there is an agreement for payment of price at a later date or otherwise (V. R 194).

Deposit with corporations.

Deposit with corporations were very common in ancient India. There were different classes of guilds and corporate bodies and their conventions were recognised by the law-courts. The members of a joint-concern or a guild were jointly liable to the bailor. Brihaspati says :—whatever is acquired, kept

or borrowed or obtained as a royal favour belongs equally to all members of the corporation (Brh—17-24), and it necessarily follows that they are jointly responsible for a debt or a deposit.

But Katyayana makes an exception in case of a misappropriation by one member of the corporation "If a debt incurred on behalf of the corporation has been eaten up by a member or used for his private purpose, that member alone shall be held liable.' (Katyayana—V. R. 188). One can be a member of the corporation, according to the customs and conventions of the society, but as soon as he is admitted, he is entitled to all its assets and incurs all liabilities. His liability ceases with his voluntary or involuntary removal.

It is clear from several rock-inscriptions that the guilds of Ancient India worked as a net-work of banks throughout the length and breadth of India. In the ordinary cases of deposits of money with the banking corporations or bankers, the transaction amounts to a mere loan or *mutuum* or irregular deposit and the bank is to restore not the same money but an equivalent sum whenever demanded. But there may be special deposits, when the specific money, the very silver or gold coin or things deposited are to be restored and not an equivalent. The guilds and corporate bodies used to receive deposits and carry out commissions in terms of the covenant. Professor R. C.

Mazoomdar in his Corporate life in Ancient India and Professor R. K. Mukherjee in his Local Government in Ancient India give full and accurate details about the corporations, but so far as the present subject is concerned, we find nothing more than the fact that these bodies used to accept bailments and carry out the contractual obligations thereof.

The dipository is also bound to restore not only the things but any increase or profit which may have accrued from it.

This follows by analogy from a text of Narada regarding sale. If a man sells property for a certain price but does not deliver it to the purchaser, he shall be made to deliver the property along with the produce, if it is immovable propevty and along with the profits arising on it, if it is moveable. So that if a cow is deposited and it brings forth a calf, both should be returned.

Comparison with the English and the Roman Law.

The deposit is a contract of benevolence. The personal element therefore comes into it. We do not accept the deposit of every Tom, Dick and Harry. The law-givers therefore make so much about selection for bailee According to the Roman Law, the bailee is not liable except for fraud. Sir William Jones quotes Ulpian :—In contracts we are sometimes responsible for deceit alone, sometimes for neglect also, for deceit

only in deposits, because since no benefit accrues to the depositary, he can justly be answerable for no more than deceipt, but if a reward happen to be given then a responsibility for neglect also is required or if it be agreed at the time of the contract that the depositary shall answer both for neglect and accident." Mr Sen in his Hindu Jurisprudence quotes Justinian: "A depositary is only answerable if he is guilty of fraud and not for a mere fault such as carelessness or negligence and he cannot, therefore be called to account, if the thing deposited, being carelessly kept is stolen, For he who commits his property to the care of a negligent friend should impute the loss to his own want of caution."

Sir William Jones praises this as perspicuous and precise, but I think, the Hindu law on the subject shows a higher cultural intellectuality.

Ihering in his 'Law as a means to an end' says that there are four levers which moves human will, the wheelwork of society—Reward, Coercion, Duty and Love. The first two based on egoistic impulses are lower, while the last two work on the denial of egoism in the higher regions of universal purposes. Duty is the prose of moral spirit and love is the poetry thereof. The Hindu conception of obligation in Nyasa is divine reward, duty and love and so it is much superior to the Roman conception on the point, that he who gets no reward need not take as much

care of it as he takes of his own goods or at any rate, he ought not to be held accountable if he does not. The Hindu law-givers give a higher standard of legal and moral duty.

The old comman Law of England erred on the other side. It provided that a bailee should keep the deposit at his peril and Lord Coke in Southcote V Bennet held that to keep and to keep safely is the samething. Gradually the rigour of the common law was relaxed except in the case of inn-keepers and common-carriers and the judges adopted the principles of the Roman law and decided liabilities according to advantages obtained by the parties to the bailment.

There is a small paragraph about the law of deposit in the Aini Akbari of Abul Fazle. It is gleaned from the Smritis and has no intrinsic value of its own. But it shows that the rules of deposit were not mere fancies of the Smritikars but were in actual use among the people.

We are now a days blinded by economic considerations. Money is the force now that moves everything. But this was not so always. The ideal rewards, honour, prestige, popularity, power and influence moved our forefathers more than the ringing coins. The basic idea in bearing the burdens in a deposit lies in this conception of the ideal reward.

Ihering says :—"It is of the greatest interest to society that ideal reward should stand in the highest

possible estimation. The higher the value which is put upon it, the more effective is the lever which society therein possesses for the achievement of her purpose."—(Law as a means to an end—P. 139).

Judged from this standard, the Hindu law of deposit stands unrivalled in the legal literature of the world. It is remarkably clear and logical in its analysis. At the same time, the imaginative and emotional bent of the Hindu race gave to it a colour of ethical atmosphere, but which for that reason does not lessen its value in practical life.

Yama, therefore, says :—"Preserve a deposit as you would your own wife and children. You are not liable if it is lost by irresitible accident or taken by the king." In life, as it presents it daily to our eyes, there can be no better synthetic interpretation of the law of favour.

CHAPTER V.

Yachitaka.

Yachita or Yachitaka means a loan of articles for use on some special occasion. Mitakashara says :— Clothes, ornaments or the like borrowed at the time of marriage or other festival from another are called *yachita*. Kalidasa in his Meghaduta says it is better to ask a favour of the high even though refused, than of the low, even though you get your wish fulfilled. It is clear, therefore, that one should be selective while making a request for loan.

Yachitakas were more common in old times. Gratuitous contracts and charitable contracts cannot serve the wealth of purposes which commerce has to satisfy, so no commerce can be based on self-denial. The scope of yachita is very narrow. The prospect of its fulfilment is connected with individual personal relations such as friendship, neighbourhood, acquaintance, relation of dependence etc. Accordingly in our modern commercial life, yachita has lost its old-world significance, value and importance.

It is equivalent to the commodatum of the Roman law. Leake says : Commodatum was the loan of a thing for some specified use (e.g. a horse for a day's riding). The essence of the transaction was that it should be gratuitous, that the lender should not receive any reward for the loan, otherwise the contract would

not be governed by the rules of commodatum but by those of Locatio conductio rei, one of the consensual contracts."

Sir William Jones defines it as bailment of a thing for a certain time to be used by the borrower without paying for it. A loan for use is to be distinguished from a loan for consumption, the thing lent is to be specifically returned in commodatum but in Mutuum, another thing of the same kind, quality, nature or value may be restored to the bailer.

This distinction was well-known to the Hindu lawyers. Matsyapurana says that he who fails to restore the borrowed article in the same condition in which it was borrowed, should be compelled to restore it by harsh reproof or shall be fined in the first amercement. (V. R. 97) '*Purvasahasa*' has been explained by Medatithi to be two hundred and fifty panas. It is the first or the lowest punishment. The word 'Tathavidha' in the text leaves no room for doubt that the exact thing is to be returned. Yachita therefore excludes loans for consumption which is a loan, though the same name was used for both.

In Mutuum, the borrower becomes the owner of the articles lent and is therefore liable to return the equivalent in value even if the goods are destroyed by pure accidental loss, but in commodatum or Yachita, the borrower is not liable for accidental loss, not arising from any fault on his part.

The essentials of Yachitaka are that there must be a thing which is lent. In common law, it must be of goods, so it is in Hindu law. Secondly, it must be lent gratuitously, for if any compensation be paid, in any manner whatsoever, it becomes a hire. It must thirdly be lent for use which must be the principal object of the transaction and not merely accessorial as a pledge but the use must be strictly confined within the terms agreed upon and lastly after use, it must be specifically returned.

Rights and liabilites of the parties.

The bailor has the right to have the thing itself delivered back when the time for which it was lent had expired or after the completion of the work for which it was lent.

Katyayana says—If a thing is borrowed for a special work, or has been taken for a fixed period, the borrower should not be made to restore it before the completion of the work or before the stipulated time. But if after the completion of the work or the expiry of the time agreed upon, the borrower fails to return the thing lent, then he must pay its value even though if it be lost or stolen. Smriti-chandrika adds that this includes loss by other inevitable circumstances. (S. C. 428).

Jagannath's commentary on this is that if a man has borrowed an awning for the company entertained

at the nuptials of his son, the owner cannot take it back on the day of the nuptials after one watch of the day is passed, for the purpose is only accomplished in part. But it may be taken if the purpose has been served ; it cannot certaintly be taken back if any part of the purpose remains unaccomplished. So if ornaments or the like be borrowed for a month, the ornaments cannot be taken back before the end of the month and the wearer of the things shall neither be amerced nor reproached (2D—39-40).

But where the owner's interests do suffer, the borrower must redeliver the loan for use even before completion of the work or even before the expiry of the stipulated time. The word used in the text is Vipatti, which means that it is such that the business of the owner would go to ruin. The owner can therefore take back if his own business would be exposed to ruin or loss for the want of the thing before the period expire, even though the borrower's purpose be only half-served. If the borrower refuses to do so, he may be reproached or fined according to circumstances.

Jagannath adds some extenuating circumstances. If the Yachibaka is sent to another province after borrowing it for a month, then if the borrower cannot produce it when needed by the owner, the borrower must however mention when taking the loan that he should send it to another province. Unless there be a fraudulent detention by the borrower, he is not liable.

There is some difference between Nyasa and Yachita. When a deposit is not returned on demand, the bailee is to pay back with interest but a yachita's value alone is payable if it is not returned in proper time.

Smritichandrika says that the fine provided by some law-givers is overruled by Katyayana. Yajnavalkya provides that if a deposit is lost after it has been asked for by the Sthapaka, the bailee shall pay the price and a fine equal to the value. According to Smritichandrika, this provision is set at naught by this text of Katyayana.

The bailor has the right of private recovery. It is laid down that if the bailee does not return on demand, he should be faced by fast and other peaceful methods to restore the same. If he even then does not pay it back, there should be a complaint to the king.

The obligations of the borrower are to use it according to the intention of the lender, to take proper care, and to restore it at the proper time and in a proper condition. The borrower should use it for the purpose for which it is lent, if he should use it otherwise, he is liable. It should be considered as strictly personal unless from other circumstances, a different intention may fairly be deduced. Thus Hari lends Madhu his jewels for use by his wife in a marriage feast. Madhu cannot therefore lend it to Rama for use by his sister.

The lender has the right to prescribe the terms and conditions on which the loan shall be made and the

borrower is bound to follow these terms and conditions with all due fidelity. If there is any excess in the nature, time, manner or quantity of the use, beyond what may be fairly inferred to be within the intentions of the parties, the borrower will not only be responsible for damages occasioned by such excess but even for losses by accidents which could not be foreseen or guarded against.

If a man lends a service of plates to his friend for an entertainment in the city and he, without the knowledge or consent of the lender, takes it to the country, where it is lost by accident or otherwise, the borrower becomes responsible for the loss. So also when the borrower is in default when he has refused to return the thing loaned after a due demand, he will be responsible for any subsequent loss thereof, although it may be occasioned by accident or "*vis major*". These rules are evident from the text on the law of deposit which should apply to the cases of Yachita also.

Kautilya provides that a Yachitaka and an Abakritaka should be returned in the same manner in which if was taken. But they need not be made good if they are lost due to the terror of wicked animals or thieves, if they are destroyed owing to distance in time or place or due to some inherent defects of the properties. (Kau—179)

The bailor could be liable, therefore, if through the wilful wrong or negligence of him, the borrower is

injured by the thing lent e.g. if the articles were infected to the knowledge of the lender and communicate the disease to the borrower.

The bailer has the right to demand the article which his friend may promise to lend as an act of kindness. This follows from the following texts.

Harita says—Whatever has been promised in word but not in deed, with a view to help the promisee in the performance of some meritorious act is a debt both in this world and the next. (S. C. 448)

Katyayana says—Whoever having voluntarily promised a gift to a Brahmana for religious merit, afterwards refuses to give shall be made to carry out his promise as if it were a debt and shall also be liable to punishment. (S. C. 449). Just as these gratuitous promises are enforceable in law, so a promise for giving a Yachitaka is also binding against him. Hindu law is not unreasonable or unjust on this point. To allow one man to create expectations, without incurring obligations to fulfill them, can hardly be regarded as just.

Special property in Yachitaka

The borrower has a kind of special property in the articles borrowed which is called the right of use in the Hindu law. It is remarkable that the Hindu Jurists had clear conception regarding qualified and special properties.

This earth, says Jagannath, is the cow which grants every wish. She affords properties of hundred various kinds (inferior if they need the assent of another proprietor, superior if his right precede assent), while she deludes a hundred owners like a deceiving harlot, with the illusion of false enjoyments, for in truth there is no other lord of this earth except the Supreme Lord.

According to Hindu law a property has two distinct elements :—(i) Basis in Sastra in that the idea of property is exclusively indicated by the Sastra and (ii) absolute user in that if signifies fitness for full disposal by the owner. The unfettered power of using or dealing with one's own property which constitutes ownership in the stictest sense, is capable, without special circumstances, of being limited or circumscribed to various extents, for as a matter of fact, the Hindu law does not recognise the existence of qualified ownership of property and the restriction upon the right of free disposal may even go so far as almost to deprive the owner of his right of alienating the property according to his choice. The widow's ownership is a very restricted right which is a mere right of use.

Srikrishna Tarkalankar expressly recognises the existence of various concurrent rights to one and the same thing vested in different persons, provided there be no incompatibilily in the co-existence of such rights. He thus distinguishes between property of the same

kind and property of different kinds and maintains that the property of one kind in a man is incompatible with and so excludes the concurrence of the same kind of property in another man. When there is no such incompatibility in the existence of different kinds of property in relation to the same thing residing in different individuals, it may exist. This position admits the existence of diverse rights inhering in different persons, constituting different fragments of the totality of rights comprised by ownership in its strictest sense. When we use the term property in relation to cases of this description, it is no doubt used in a qualified sense. Viramitrodaya uses the expression Paripalaniyarupa Svatva to mean the right of custody. In Yachitaka, the borrower has the right of use—Bhoga Svatva.

Manu says (8-146) :—Things used through favour, such as a milch cow, a camel, an ox or animal that is made over for breaking in, are never lost to the owner.

Medatithi comments that the enjoyment is by friends out of friendship, so there is no loss of title. Things other than those mentioned in this text may be lost, clothes used though favour become torn and cannot be returned. In that case, the value is payable. Manu gives 10 years as the period of limitation. If a owner allows his chattal to be enjoyed by others during ten years, and he though present, says nothing, he shall not recover them (M-8-147). But this does not apply to Yachitaka.

But Marichi in Parasaramadhava says—"When riding animals, ornaments and the like are lost for use through friendship, they should be returned within 4/5 years or else they become liable to forfeiture. Marichi's dictum does not prescribe the period of limitation strictly, he speaks of the chances of loss.

There are texts of Vyasa, and Brihaspati also which enjoin that a Yachitaka is never lost by use. The clear sense of the texts therefore is that a thing lent for favour is never lost by use as the possession of the bailee is that of a trustee and he accordingly acquires no title by adverse possession. Title and not possesssion is the crucial test in deciding cases of dispute. In the case of possession by force, through hired soldiers, or ruffians, possession by theft or concealment, possession of things given because of friendship or of things let out on hire, possession for safe custody or by borrowing, title alone should decide the issue, because the rightful owner has no reason to object to the possession in some cases and has no power to do so in the others.

The law of adverse possession received the tender care that it deserves in the hands of the Hindu Jurists, while the Smritikars regarded the right of the person in possession as sacred, even though he do not own it nor assert the possession of an owner, and laid down that a possession for number of years creates title by adverse possession, still they were careful to distinguish

that fraud and wrong should create no title ; specially where the rightful owner has no reason to suspect. It is commendable that the ancient sages had enough forensic insight to rule that a Yachitaka never turns into the property of the borrower by long use or lapse of time.

Interest in Yachitaka.

Things borrowed because of friendship cannot bear interest from its very nature, but there may be circumstances which necessitate the same for the end of justice. The sages were aware of the same and prescribed conditions in which interest could be levied.

Katyayana says—If a man having borrowed an article goes away without delivering it back, it shall bear interest after the lapse of a year (Vy. M. 66). Parasara says that this refers to the case of a Yachitaka which has not been demanded.

Going to a different country is not essential, for even if a person residing in his own country, do not return any article borrowed for use, when it has been repeatedly demanded, interest becomes due even if he be unwilling to pay and there be no agreement to that effect. (V. C. 14).

Vivadachintamani further explains that interest would be charged after six months if the Yachitaka is not returned on frivolous pretexts. Otherwise after one year.

But in case a man goes away to foriegn part, after the Yachitaka has been demanded, interest shall accrue after three months. (Katyaynna—Vy. M. 64). The rate of interest is 5 p. c. It is said by Katyayana—that interest is not chargeable on what is lent out of friendship so long as it is not demanded. If however it is not repaid, five per cent interest is to be charged thereon.

Narada also provides that interest on what is lent out of friendship cannot be taken without agreement, but interest will run after half a year even without stipulation. Vivadachintamani reconciles the text of Katyayana and Narada by saying that Narada's text refers to a case of deposit.

Others however explain that Narada's text apply not to Yachitas but to loans which were made exempt from interest being lent on friendship.

But whether this apply or not, it is clear from Katyayan's text that Yachitas would bear interest if there be fraudulent detention of the same.

Gift of Yachita.

A Yachita eannot be given to anybody. It is said by Brihaspati—Common property, son, wife, pledge entire property, deposit, what has been borrowed for a special occasion or what has been promised to another person, these are the eight kinds of thing that should not be given. The borrower, as said before, has

merely a qualified property and it is rightly said by Vivadachintamani, commenting on it, that in the case of deposits, pledge and borrowed things, there can be no gift on the ground that the man has no ownership over them. "No one has any power over a pledge, a deposit or a borrowed article" (V. C. 73).

A owner has the right of free disposal. A borrower is a mere custodian and has the right of use. 'The gift of the goods of other is invalid (V. C. 76) so one cannot give away a borrowed article.

Narada and Daksha supplement it, by saying that even in time of distress, the borrower cannot give it away. It is not accordingly included in the eight kind of valid gifts enumerated by Brihaspati and Narada which are (i) Price given for a purchased article, (ii) wages for work done, (iii) reward given out of satisfaction, (iv) what is given out of love and affection, (v) what is given in gratitude as recompense, (vi) what is given for the marriage of a wife, (vii) charitable gifts, (viii) gifts made through devotion.

Sale of Yachita.

On the same ground, a borrower cannot sell the borrowed article. Vyasa says—When a man sells another's goods behind his back, either a borrowed article, a bailment for delivery, a deposit, or what has been stolen, such a sale is called a transfer without ownership (V. R. 100).

This is nothing but commonsense and all the Smritis agree on this point. The procedure for recovery is also the same as in the case of sale of a deposit. When an article has been sold by a man who is not the real owner, the legal owner shall recover it from the purchaser (S. C. 498).

Kautilya as provisions on the point are interesting :— "On the detection of a lost property, (this applies to a case of Yachita as it is a sale without ownership) in the possession of another man, the owner shall cause the possessor to be arrested through the judges of a court. If however time or place does not permit loss of time, the owner himself shall get hold of him and produce him before the court. The judges should ask the man in possession :—From where did you obtain the article ?" If the man can prove the manner of his acquisition, but is unable to produce the vendor, he shall only be made to restore the article to the lawful owner and should escape further punishment. If the man can produce the seller, then the seller should be made to restore the price and be punished as a thief. If the seller in his turn can succeed in proving himself innocent by indicating a legal source of acquisition, he shall be let off. In this way it must be traced to the real offender. He shall pay the price and shall get the punishment of a thief.

After proving his claim, the owner shall get back his property, on his failure to establish his title, he

shall be fined five times the value of the property and the property shall escheat to the king." (Kau—Bk III chapter 16).

The Smritikars however did not give the owner the right of personal recovery.

Yajnavalkya says if a man whose property has been stolen or who misses it gives no notice of its recovery to the king, he shall be fined 96 panas. The penalty is imposed on him for his attempt to defraud the king of his gain from the recovery of lost articles (V. C, 60).

Kautilya says the same thing :—If the owner takes possession of a lost article without obtaining permission from the court, he shall get the first amercement." He further adds :—'Stolen or lost articles when found should be kept in the toll-gate. If no claimant comes forward within three fortnights, such articles shall go to the king. He who proves his claim to a biped shall pay four panas for commission to the king. In this manner the fee for a single-hoofed animal is 4 panas, for a cow or buffalo 2 panas, for minor quadrupeds one-fourth of a pana and for articles such as precious stones, superior or inferior raw materials, five percent of this price."

It is seen that realisation of fees in case of lost and missing articles, or of articles sold without ownership, was a source of revenue with the king.

Com parison with other laws.

Sir William Jones calls Yachita as one of the most usual and most convenient forms of bailments in civil society. Yachita was very common in ancient India but still the sages extolled non-acceptance as one of the principal virtues.

In the Athnisena Jataka, Bodhisatta spoke when the king asked him to take anything whatsoever he desired :—

Neither suitor, nor rejector of a suit, can pleasant be,
That's the reason, be not angry, why I have no suit to thee.

As one advances in spiritual life, the more he dislikes favours from others. As to the care to be employed by a friendly borrower, Sir Jones say :—The negligence of the borrower who alone receives benefit from the contract is construed rigorously, and although slight, makes him liable to indemnify the lender ; nor will his incapacity to exert more than ordinary attention on the ground of an impossibility, "which the law, says the rule, never demands" for that maxim relates to things absolutely impossible ; and it was not only very possible but very expedient for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it : if the lender, indeed was not deceived, but perfectly knew the quality, as well as age of the borrower, he must

be supposed to have demanded no higher care than that of which such a person was capable; as if Paul lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection which he would expect from a riding master or an officer of dragoons. * * * If the borrowed goods be stolen out of his possession by any person whatever, be must pay the worth of them to the lender, unless he prove that they were purloined notwithstanding extraordinary care." (VIII—393-4).

In the Institutes of Justinian we also get—He who has received a thing lent for his use, is indeed bound to employ his utmost diligence in keeping and preserving it, nor will it suffice that he should take the same care of it, which he was accustomed to take of his own property, if it appear that a more careful person might have preserved it in safety; but he has not to answer for loss occasioned by superior force or extraordinary accident, provided the accident is not due to any fault of his."

The standard in Hindu law is different. It does not require the borrower to take exceptional care. It lays down no abstract standard but a concrete and relative standard which takes into account the differences between human beings and says that one is not liable unless there be wilful default. The text of Yama is very illuminating. "One should keep another's article just as he preserves his own children and wife.

He is not to restore it when it is lost by an act of God or the king." The standard is what one should take of his own goods, Consequently the provision in Hindu law seems to be the better one because it is wide in latitude and gives scope for decision according to the peculiar circumstances and facts of each case.

There is a curious reference to the commodatum in the law of Israel. "If a man borrow anything of his neighbour and it be hurt or die, the owner thereof not being with it, he shall surely make it good, but if the owner thereof be with it, he shall not make it good." It is difficult to make much sense out of it. The owner's presence may happen very rarely. The original may mean the possessor and the idea behind it is that the possessor should not lose sight of the articles or animals borrowed and should take personal care of it.

On a comparative study therefore, Hindu law can boast of its reasoned and logical view in the matter. The modern jurisprudence is giving up the old-word concepttons of different degrees of care and neglect and is accepting one uniform standard - the care taken by a reasonable prudent man in his own affairs. The degree and the care is regulated by the conduct of a prudent man. Hindu law recognised this principle from very earliest times and it can therefore be proud of its achievements in this branch of law.

Man in ordinary life is busy with one's own self. He strives for his own interest and tries to obtain it by any means that he can get hold of. How can the world exist under a regime of egoism which desire nothing for the world but everything for itself alone. The answer is the world exists by taking egoism into its service, by paying it the reward which it desires The world interests egoism in its purposes and is then assured of its co-operation.

Yachita works not on the principle of selfish egoism, but it is the result of benevolent disposition which seems quite inexplicable from the standpoint of egoism.

But still on a critical analysis, we shall find that the lender's egoism is satisfied when he lends a thing to his friend. The purpose of humanity is served by control of egoism, by giving to the borrower a pleasing voice and to the lender a melting heart.

When a man sacrifices for his friend, his self-denial is not without interest. Some sort of inner satisfaction there must be which is the impulse behind his action. In this manner, human civillzation can make its progress. "Our whole culture, our whole history rests upon the realization of individual human existence for the purposes of the whole. There is no human life which exists merely for itself, everyone is at the same time for the sake of the world, everyman in his place, however limited it may be, is a collaborater in the

cultural purposes of humanity" (Ihering—Law as a means to an end.—59-60).

Yachita conceived from this philosophical standpoint serves a great purpose by helping co-operation, collaboration and fellow-feeling.

Others however do not accept the view of Ihering that man's egoism is the ultimate unity in human activities and social life moulds this into altruism and other disinterested virtues. They contend that there are ethical forces which are co-existent with egoistic inclinations, in human nature, and both develop under the influence of social conditions.

A discussion of this very interesting subject is outside the scope of our study. We can only say that life in society requires acts of friendliness and friendly borrowings and lendings. The reward in it is what the ancient Hindus called virtue and what Ihering calls the pleasures of self-denial.

I shall conclude this chapter by a comparison between a text of Brihaspati and a paragraph in the essay on bailments. Brihaspati has laid down that if a man makes a distinction between his own property and that of the depositor, the bailer is liable and shall pay it with interest.

Sir William Jones say :—There are other cases, in which a borrower is chargeable for inevitable mischance, even when he has not, as he may legally, taken the whole risk upon himself by express agreement. For

example, if the house of Caius be in flames, and he, being able to secure one thing only, save an urn of his own in preference to the silver ewer, which he had borrowed of Titius, he shall make the lender a compensation for the loss; specially if the ewer be more valuable and would consequestly have been preserved, had he been owner of them both: even if his urn be more precious, he must either leave it or bring away the borrowed vessel or pay Titius the value of that, which he has lost; unless the alarm was so sudden and the fire so violent that no deliberation or selection could justly be expected, and Caius had time only to snatch up the first utensil that presented itself."

The commentators take *Bheda* 'want of care' to mean separation of the deposit from the depositary's own property and bestowing less care on it than on the effects of the depositary. Saraswativilasa explains *Bheda* as deceit. The bailee is therefore forbidden to neglect or to make any wilful and fraudulent distinction between his own goods and the articles bailed.

The marked similarity is really very interesting and apart from its value in the domain of comparative Jurisprudence, may lead one to think that through some unknown channel, Hindu culture lent its influence on the Roman law and, through it, on the European law.

CHAPTER VI.

Anvahita or the law of mandate.

Work and trade are fundamental requirements of human society. But some work is often done gratuitously. This is known as mandate. The Sanskrit equivalent is Anvahita.

Mandate is a consensual contract in which a person entrusts the management of some business to another who undertakes to do it gratuitously. The person who gives the work is called the Mandator and who undertakes to do the work is called the Mandatary. In common law, it is bailment of personal property in regard to which the bailee engages to do some act without reward. A mandate, says Kent, is when one undertakes without recompense to do some act for another in respect of the thing bailed.

Relation to deposit.

Mandate is closely related to deposit—the distinction between the two is that the former lies in fesance and the latter simply in custody. Philosophically speaking, it may be doubted whether this distiuction really exists. In deposit, something almost always remains to be done, besides a mere passive custody, e. g. if it is a living animal, suitable food and exercise must be given to it.

The word Anvadhi or Anvahita applies both to the ases of gratuitous and paid commissions. Kautilya

says :—If a mandatary, entrusted with a property for delivery to a third person fails to reach the destined place or is robbed of the property by thieves or the property is lost or destroyed along with the property of the merchant whom he accompanies, he shall not be responsible for it. A kinsman of the messenger who dies on the way is not liable to be harassed for the bailment.

Mitakshara defines Anvahita to be a deposit handed over to a third person for being delivered to the original owner. Katyâyana defines it :—When a thing is deposited with these directions—'Deliver it, as by my desire to such a man when he shall desire it for his own benefits'—it is called Anvadhi.

Jagannath's comments on it are worth quotation. 'When he shall demand it for his own business'—by this expression is meant that if any person require a a thing and it be sent by a messenger, it is Anvahita. Some hold, because the word 'owner' is constantly employed in the Mitakshara and other works that the distinction is as follows : effects and the like, previously deposited, which are delivered to the owner, through the medium of another person are Anvahita, and what is bailed by the owner through the medium of another is Nyasa. But the word 'owner' is not found in the text of any sage, to ground upon it, the opinion of these authors. Halayudha, reading 'when he shall demand it for this purpose' thus expounds the text 'when a thing

is bailed with these directions, deliver this to such a man, when he shall demand it for this purpose', it is called a deposit for delivery. The meaning is that if one person, to oblige another, entrust any chattel employed at nuptials to some other person, with these directions "when Devadutta requires this to use it for nuptials or the like, deliver it to him—that chattel is a deposit for delivery or, if a man himself, or by a messenger demand payment of a debt and the debtor, after two or three days, deliver the amount of it to some other person, it is a deposit for delivery" (2D—9)

In the Naradiya Bhasya it is said that a merchant of Mathura is going to Kanauj and he is entrusted with an object for delivery to some body there, this is a deposit for delivery. Some other Tikakars have given other definitons of Anvahita, but these are not in common use. From the definition and illustrations given above, we can see that it is an appropriate synonym for mandate.

Distinction with deposit.

The true distinction between a mandate and a deposit is that in the case of a deposit, the principal object of the parties is to the custody of the thing, and that service and labour are mere accessorial; in a case of Mandate, the labour and services are principal objects of the parties and the deposit is merely accessorial. Mandate is of two kinds—first when the

bailment is to be carried from one place to another and second, when some act is to be performed about the thing bailed. Gratuitous Silpinyasa therefore comes within mandate. Silpinyasa is deposit of gold, with a goldsmith for the making of ornaments and the like.

Manu does not name any other class of deposit. He says that the rules and methods applicable to deposit shall apply to all classes of deposits. Yajnavalkya mentions Anvahita but does not mention Silpinyasa, but it is included by the words 'and the like in his text'. Narada enumerates them in his text :—This very law is applicable to cases of loans for use, bailment for delivery and the like, articles bailed with an artist, bailments in absence, mutual deposit, fine or valuable chattel obtained in private, these six are called deposits. Halayudha reads the third line differently which means the custody of a rich minor.

Brihaspati's enumeration is different. He says :—This law is enacted for the case of a deposit for delivery, a loan for use, a bailment with an artist, and a pledge, and like wise, in the case of a person received under protection.

He further provides that if a contest arise, concerning a deposit privately given, proof by ordeal is directed for both parties.

Jagannath's comments deserve quotation—"If the depository do not acknowledge a deposit privately

received or the bailer, having received back what he had himself deposited, deny the receipt: or if he allege a deposit, though none have been made, in all these cases, ordeal is directed if there be no evidence. Chandeswar says, if a contest arise concerning a woman, or slave and the like, who from fear or other motive have sought protection and are claimed by their lord, the same law is enacted.

Here all the rules declared in regard to a private deposit are to be applied to each case, from deposit for delivery to persons received under protection. Therefore a depository protects what he has received in trust, like his own property, from water, fire, thieves and other danger, and likewise in the case of a person received under protection. Whenever the property of one person is, for some cause, delivered into the hands of another for safe custody, the rules declared in regard to deposits are to be applied, therefore in the case of a person delivered by the king or the like into the hands of a guardian or the produce of a field for safe custody by a subject. What is the law in respect of bailments which is extended to loans for use and the like? It is answered all the rules prepounded by sages from the delivery to the recovery of a deposit must be understood. (2 D—12-13).

Characteristics of Anvahita.

These things are necessary to create an Anvahita *i.e.* a mandate.

(i) There should exist some thing which should be the subject matter of the contract in respect of which some act is to be done,

(ii) It should be done without receipt of any reward.

(iii) And it should be a voluntary contract.

Things done under coercion or for recompense are excluded from the law of mandate.

Sir William Jones says—"A mandatary to carry is responsible only for gross neglect or a breach of good faith.

A mandatory to perform a work is bound to use a degree of diligence adequate to the performance of it.

A man cannot be compelled by action to perform his promise of engaging in a deposit or a mandate.

As to the last proposition, Hindu law holds a contrary view. A naked promise is enforceable in Hindu law. Vishnu says (V178)—He who does not give what he has promised shall be compelled to give it and to have the first amercement. In the Matsyapurana, there is a text—The king should fine one gold coin, if a man give not what he has promised.

Harita is very clear on the point. "He who gives not what he has promised and he who takes back

what he has given suffers torment in various regions of hell and is born in the womb of a low animal. What is promised in word but not performed in deed is a debt of conscience both here and the next world. Jagannath says, the promise should be enforced by the king.

It can be safely said, therefore, that a mandatary can be sued by the mandator to perform his gratuitous promise.

As to the amount of care, the law is the same as in deposit. "The mandatory being considered as having engaged himself to a degree of diligence and attention, adequate to the performance of his undertaking, the omission of such diligence may be according to the nature of the business, either ordinary or slight neglect, although a bailee of this species ought regularly to be answerable only for a violation of good faith". (Jones—Vol VIII—380)

There are some texts of Katyayana regarding mandates. These are as follows :—When any artisan has undertaken to repair or renew any article within a fixed time, if he detains the article beyond the stipulated time and it is destroyed or lost, he must be made to restore it even when the loss is due to any invitable accident. If the destruction of the article given for repairs has been due to some inherent defect in the article itself, then the artisan should not pay its value. He is to make it good

only when the destruction is due to his own negligence or fault. Smitichandika's gloss on it is if the article was an old one and accordingly it was destroyed in the work of cleaning or repairing, then the cleaner is not held liable for the loss, but if the loss is due to inefficient handling, then he is responsible for it. In the case, where crude material has been given to the manufacturer, if the article is lost in the process of manufacturing, the liability lies on the manufacturer. But if the loss occurs, after the finished article has been offered, the loss belongs to the owner, who did not receive the finished product.

For example, when a quantity of yarn has been made over to the weaver, he is liable, if the loss occurs when a part only of it has been woven, he should then re-weave the entire cloth with yarn procured by him, but if the entire cloth has been woven and offered for delivery, then he is not liable for any subsequent loss. (S, C. 425 V. R. 98).

Jagannath elaborates and explains the matter in his commentary. He says :—"Where ornaments or the like are entrusted to an artist for repair, in that case, if the artist from his own conceit, without the consent of the owner, attempt to remake the unbroken parts and the ornaments etc, happening to be old, are destroyed, the artist shall pay the value or deliver an equivalent to the owner, even earlier than the time agreed on for repairing the ornaments * * *. In the

case of a thing bailed to an artist and injured by his acting inconsistently with the owner's directions, the artist shall be forced to pay its value. Consequestly, if a part however small, of the thing in question be broken by working on the part directed by the owner, it must be restored to its former condition, that is the loss falls on the artist. * * * * If the owner do not receive, saying 'let it remain for the present' or desiring the work to be done in another manner, it is the owner's loss. But if the artist, agreeing to do the work in another manner, then, should that agreement be infringed, the fault is his.

Should it be contested by the owner that he had directed different work and by the artist, that the very work directed, was performed; in this case the artist, even though he had tendered the thing, shall be compelled to pay its value, if it be proved that different work had been directed, but not otherwise. And in every case he shall be forced to pay its value, if he had not tendered it.

In a case, when the form of the work is disputed, let him first receive his chattel and afterwards contest the matter, at the time of paying the artist's wages. If the artist will not deliver the thing without receiving his wages, it is no tender; in this case, witness should be taken. When the cause is tried at a subsequent time, the right of one party being ascertained by evidence or by ordeal, whoever is last in the suit, the

loss shall be his, even though the thing has been lost by accident. If the wages have been already paid or it be suspected, that the thing has been changed, let the owner instantly apply to the king or his officer or take witnesses as above mentioned. This and other points should be understood in the case of a thing seized by the king or the like, as well as in the case of a thing lost by the act of God and the same also, according to circumstances, if gold, silver or the like, be bailed for working into new ornaments."

It follows from this very lucid exposition that the mandatary cannot go behind the directions of the mandator, He must abide by the conditions laid down at the time of mandate.

The mandator is bound to reimburse the mandatary for all expenses and charges reasonably incurred in the execution of the mandate and indemnify him for his liability in all contracts which arise in the proper discharge of his duty. The mandatary in his turn is bound to preserve the thing bailed with care. Narada says, (6. 4) "The implements of work and whatever else may have been entrusted to their work, they should keep them with due care and should not act dishonestly in whatsoever manner."

The owner is the principal and the mandatory resembles an agent, so acts done by the mandatory in the discharge of his duties could be deemed in law to be done by the mandator. Brihaspati makes this very clear.

'One who is employed by the master to look after his earnings. expenditure, his money-lending, agriculture or commerce, is called the agent or the mandatory. Whatever he does in native or foreign countries, in respect of profit, loss, expenditure and interest, the master cannot gainsay the same. (Bh 16-17).

Katyayana also holds the same view and prescribes that the mandator cannot change or alter the transaction of the mandatary. The law of mandate is explained by the rules prescribed by Kautilya for commercial agents. He says :—An agent, selling goods of the principal at particular places and times was bound to render all profits to the owner. He is not responsible for the change of rates. He should sell at the market-rate and pay at the rate which he received when he sold. But he was to exercise the diligence of a prudent man. Consequently, if by his fault, owing to distance and time, the price falls down, the agent must pay at the market rate of the time when he received the goods. But an agent who sells at price prescribed by the principal, shall not give profit to the owner if he sells at the higher rate but shall have to make good the loss, if he sells at a lower price.

The commission-agents, however, who are called Svamvyavaharikas by Kautilya are free from all liability even in case of loss and destruction by irrestitle force and inevitable accident. They were entitled to

discounts for deterioration of goods by loss of time and to charges incurred for despatching them to another place and clime. They used to get a share of the profits, gained from the merchandise bought from the other country. This is however explained by Jaysawal as commission paid to other merchant-companies.

The bailment in a mandate is not liable to be transferred. Its transfer is invalid. It is included among the nine objects which cannot be given according to the text of Daksha, even in times of great distress. If the mandatary makes a gift of the thing, bailed to him in mandate, he is to make penance for the same. The purchaser or the donee is liable to punishment as Narada enjoins that he who gives and he who takes things that are not to be given are liable to punishment. Smritichandrika says that one cannot give the object of a mandate, as the mandatary has no title therein. Brihaspati includes Anvahita in cases of sales without ownerships, so does Vyasa.

Smritichandrika quotes all the texts of Vyasa. He says :—When a borrowed article, a mandate, or a deposit or the thing of another is sold in the absence of the owner, it is sale without ownership. If the purchaser brings his vendor, he becomes free and the suit goes on between the claiment and the vendor. He, to whom the thing is traced, should pay to the purchaser an equivalent or the value thereof accord-

ing to his wish. If the claimant fails to prove his title, the purchaser gets the article and the claimant has to pay a double fine.

The contract is called one of the law of nations, that is one arising from the law of nature, common to nations, and it is founded upon mere consent, express or implied, and also it is a contract of mere beneficence. As Burke says, there is some hidden virtue, some vital force, some element of mystery in contracts written and unwritten and this is the sheltering bulwark of civilization. The liability of a mandatary may be called a debt of honour.

Say, what is honour ? 'Tis the finest sense
Of justice which the human mind can frame,
Intent each lurking frailty to disclaim,
And guard the way of life from all offence
Suffered or done.

This sense of honour is the guiding factor in deciding all disputes in bailments. In the world of strife, man attains peace and culture by following the Vrata and the Dharma which are the motor forces in moving the world-machine to system and coherence. The fundamental obligation of Anvahita rests on this spiritual foundation and we can never understand the law, if we dissociate it, from its ethical environment.

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CHAPTER VII.

Avakritaka.

Avakritaka is the Sanskrit equivalent for hire. The law of hire is called Locatio or Locatio conductio in the Roman Law. It is a contract, where by the use of a thing or the services and labour of a person are stipulated to be given for certain reward. Hire is a bailment of a personal chattel where a compensation is to be given for the use of the thing or for labour or services about it or in other words it is a loan for hire or a hiring or letting of goods or of labour and services in respect of some goods for reward. Sir William Jones writes :—"Letting to hire is (i) a bailment of a thing to be used by the hirer for a compensation in money (It is called Bhataka in Sanskrit) or (ii) a letting out of work and labour to be done or care or attention to be bestoweed by the bailee on the goods bailed and that for a pecuniary recompense. (Silpinyasa and custody of cattle and crops will come within this section) or (iii) of care and pains in carrying the thing delivered from one place to another for a stipulated or implied reward. (This is Anvahita or Anvadhi.)

Mere contracts for services where there is no bailment do not come within the scope of a bailment for hire.

Bhataka—Hire of things.

According to the Roman law, a letter, in virtue of the contract, impliedly engages to allow the hiree the full use and enjoyment of the thing hired and fulfil all his engagements and trusts in respect of it according to the original intention of the parties. This implies an obligation to deliver the thing hired to the hirer, to restrain from every obstruction to the use of it, by the hirer during the period of bailment, to do no act which shall deprive the hirer of the thing, to warrant the title and the right of possession in the hirer, to enable him to use the thing or perform the service to keep the thing in suitable order and repair, for the purpose of bailment and finally to warrant the thing free from any fault inconsistant with the proper use and enjoyment of it. (Storey on Bailments—P. 310).

There are identical provisions in the Hindu law, either prescribed by specific texts or applicable by analogy from the law of sale and purchase. Brihaspati says that if a man sells a thing, knowing it to be faulty, he shall pay twice its value and a fine of equal value to the king (V. R. 192). This would be the law in hire by analogy. Kautilya provides that if a man sells an animal suffering from leprosy and such diseases, he shall be fined 12 panas. Warranty of title is provided by the law that one who is not owner shall not make any transfer regarding the same.

Principles that regulate hire.

Principles which regulate payment by a hirer are similiar in their character to those which govern the payment of wages by an employer. If a man hires a conveyance or a beast of burden but does not take them afterwards, he shall have to pay a fourth part of the hire as compensation, but he shall have to pay the full fare, once he takes it, even though he gives it back after procceding half the way (V. R. 164) and the text of Narada above is enlarged by Vriddha Manu. "He who has hired a carriage, a vehicle of any sort and takes it and goes to another place, he shall pay the hire even though he made no use of it."

The hirer is to return the article hired after the stipulated time or as soon as the work is finished, otherwise he must pay the fare so long he does not return the thing. Katyayana says—After having hired an elephant, a horse, a bull, a mule, a camel, if a man fails to return the animal after his work is done, he shall be made to pay the hire. (S. C. 479). The period up to which hire is to be paid is made clear by this Sloka "He who hires a house, a water-vessel, a shop and the like shall pay hire to the owner until he restores the same. (S. C. 479). Narada has a similar text. He who hires at a fixed price an elephant, a horse, a bull or cow, an ass or a camel shall be made to pay for the hire of it as long as he delays to restore

the cattle, having used it according to agreement. (V. C. 103).

If the article is not returned in time, the hirer is liable for loss or destruction in cases of inevitable accident. Narada says—If one has hired utensils or vehicles, he should return them after the expiry of the stipulated time. If there has been any damage or loss except by an act of God or the king, the hirer is liable for the same. (V. R. 169).

Apararka however explains the text of Narada in a different way. He says that the earthen vessels which are taken for conveyance of ghee, oil and the like should be returned after the period of hire. Of them those that are broken or destroyed during besmearing them with earth should be paid by the owner but if they are broken or destroyed by clash, the hirer shall be liable.

It follows from the law of deposit, that a hirer is liable, if hire is lost or destroyed by his fault.

The lease of a house is not a bailment, so it is outside our study ; though they come within the law of Bhataka.

Kautilya says :—Properties, either borrowed or hired, should be returned in the same condition in which it was taken. If owing to distance in time or place or owing to some inherent defect of the properties or to some unforeseen accident, they are lost or destroyed, they should not be made good. (Kau-179)

Hire of labour and services.

Locatio Operis is divisible into two branches—namely *'faciendi'* and 'mercium vehendarum.' The *first* is the hire of labour and work to be done or care and attention to be bestowed on the goods bailed by the bailee for compensation. The second is the hire of the carriage of goods from one place to another for a compensation. The first has two classes again :— (i) first, the hire of tailors to make clothes, of jewellers to set gems and of watchmakers to repair watches and the like. This is silpinyasa. (ii) hire of custody—where goods are deposited and a reward is paid for the care and attention about the goods. Warehousemen wharfingers, and other depositaries for hire belong to this class. There is a topic of law regarding disputes between herdsmen and the owners of cattle.

Silpinyasa.

In Hindu law, we find references of bailments with artists generally with reference to goldsmiths for making ornaments and to washermen for washing clothes. Smritichandrika explains silpinyasa as placing of gold etc. in the hands of goldsmith and the like for making ornaments. In the Vyavahara-Prakasha we get that if a washerman destroys old and worn clothes while cleaning, he is not liable for the loss, but if through his inexperience or ignorance, he causes damage or loss, he is liable. This is the explanation

of Katyayana's text, where he says that the artist is not liable where the loss is due to some inherent defect in the bailment, but he is liable when there is any fault in his workmanship. We find the same explanation and illustration in the Saraswativilasa.

In case of bailment with an artist, he is not liable, as usual with deposit, for loss due to an act of God or the king. But there is an exception when there is a fixed time for carrying out the work, the artist will be liable even for acts of God and the king, if he keeps the article after the expiry of the time.

It is laid down in Viramitrodaya and Smriti-chandrika that a bailment which is lost or destroyed while work is being done on it, not for any inherent defect but otherwise, then the artist is liable. After completion the artist is not liable.

On this point the Hindu law is at variance with the law of Europe. The common law of England enjoins that if the thing of the employer, on which the work is done and for which materials are furnished is by accident or without the fault of the workman destroyed or lost before the work is completed or the thing is delivered, the loss must be borne by the employer and he must pay the workman a full compensation for the work and labour already done and materials found although he has derived no benefit therefrom. (Menetone v Athanes 3 B. Wo. R. R. 1592). Thus when a ship was accidentally destroyed by fire while she was under-

going repairs in the dock of a ship wright it was held that the ship-wright was entitled to full compensation for all his work and labour done and materials found and applied thereto before the loss. This is the view of the French and the Roman Law.

The following are the rules regarding washermen. Narada says (V. M. 372) :—It a washerman loses a cloth given to him for cleaning, he is to pay its price less by one-eighth, if it had been washed once only, less by one-fourth, if washed twice, less by one-third if washed thrice and less by half if washed four times and in this way after half the value is lost, less by the quarter for more washings.

Yajnavalkya provides :—It the washerman wears the cloth given for washing, he should be fined three panas, if he sells it or gives it out on hire or pledges or lends it for a special purpose, he should be fined 10 panas.

Manu provides that a washerman should wash the clothes of his employers gently on a smoth board of Salmali wood. He should not return the clothes of one person for those of another nor allow anybody but the owner to wear it.

The Smriti-writers were clever people and very ingenuously determined the difference in weight of the things bailed and the finished product after work was done on the same. Manu says :—(8-397) "A weaver who has received 10 palas of thread shall return cloth weighing one pala more. He who acts differently shall be compelled to pay a fine of 12 panas.

Yajnavalkya lays down—(2—178-180), "In fire gold remains unaltered, silver loses 2 palas in weight in hundred, zinc and lead lose 8 p. c., copper 5 p. c., iron 10 p. c.; coarse wool and cotton yarn however gain 10 p. c. in weaving, wool and yarn of middle count gain 5 p. c, and those of very fine count 3 p. c. only, but in the case of embroidered clothes, there is a loss of thirtieth part, there is neither loss nor gain in respect of silk and bark."

Misra says that these proportions are to be borne in mind when one should give crude materials to the artisans and receiving from him the finished goods.

Yajnavalkya next says generally that where a thing has deteriorated, the artisan should be compelled to give compensation which men versed in the nature of these things may declare proper and just, upon examination of the place, the time, the use, durablity and non-durability of the disputed object. (7-2-187). Mitakshara explains that this provision is applicable in all cases where the exact proportion of loss or increase is not determinable. A rough calculation is to be made there by experts on the subject.

Brihaspati gives the definitian of a '*silpi*' in Smrichandrikā. A person is called an artisan by the wise who can work in gold or other metals, thread, wood, stone or leather and can also do repairs in them. There are four grades among artisans, the man under training, the trained man, the expert and the master

artisan. When they work jointly, each will receive, one, two, three and four parts respectively of the remuneration received for the work done. The general rule is that in joint-concerns when goldsmith and other artisans work together, they shall share the remuneration in proportion to the work done by each. (S. C. 435).

The leader is entitled to a double share in the remuneration.

Obligations of the workmen.

Obligations of the workmen are (i) to do the work, (ii) to do it at the time agreed upon, (iii) to do it well, (iv) to employ the materials furnished by the employer in a proper manner according to the directions and (v) lastly to exercise proper diligence.

The workmen who used to do work for wages were called Bhritakas and the artisans were called Silpis. Some worked for cash money, while others worked for a share in the product of the work. Narada names the manager as Adhikarmakrit and he says that he is placed in charge over all others. Smritichandrika adds that he is one who is placed in charge of fields, gold etc. and as general manager he supervises every thing and he is also called Kautumbika, being over the dependants of the master.

Vriddhamanu says if a man promises to do work and then does not do it, he shall be made to do it by

force. If he does not do it, he should be fined 200 panas. If the employee destroys anything through negligence, he should make it good but he should pay double if he causes the loss or destruction out of malice, but he is free from blame when the article bailed has been stolen by thieves, burnt by fire or washed away by flood. If at the time of the actual performance of the stipulated work, the workman does not do the work but creates difficulties, he should pay double the wages and another should be employed in his place. (V. R. 162).

Brihaspati says :—An employee, if he does the least act of fraud with the employer, he loses his wages and a dispute arises therefrom. (V. R 159). Jagannath says that a fine is intimated from it.

"If a workman, having received his wages, perform not his work though able to do it, he shall pay twice the wages as fine to the king and the full amount of the wages to the master." (S. C. 473).

Yajnavalkya says on the point that a '*Karmakara*', who desists from working after getting his '*vetzna*' shall pay twice the same and the full amount only, when he has not received the wages and the materials received by him must be diligently kept by the workman. (2 196).

Mitakshara explains the text saying that he shall be compelled to perform his work after paying him the promised wages.

If a workman refuses to do work after agreement, he could be made to do his work by force. There are several texts to that effect. Narada says :—A servant, who refuses to perform the work he has undertaken, shall be compelled to fulfill his agreement, first paying him his wages but if he persist in his refusal after receiving his wages, he shall forfeit twice their amount. (V. R 158).

Brihaspati—He who has promised to perform work and does it not, shall be compelled even by forcible means and if he still refuse to complete it, he shall be fined two hundred panas of copper. (2D—384).

Katyayana—He who begins but does not perform his task shall by force be compelled to finish it. If he refuse still, he shall incur punishment. (V. R.—160).

Manu—If a workman fails to perform his work according to agreement not from any disorder but from indolence, he shall be fined 8 ratis of gold and his wages shall not be paid.

Yajnavalkya—One who declines the work when yet distant, shall be compelled to pay the seventh part of the wages fixed, or the fourth part, if he declines it on the way, but he who quits it half way, shall be forced to give the full amount of the wages.

The apparent contradictions about fine are thus reconciled by Jagannath. If a man not having received his wages, go elsewhere through avarice, he shall be fined the full amount. If through indolence, he do not

perform the work, two hundred panas but if he do not begin the work, eight ratis of gold. He cites other views, bnt the niceties of the same need not be gone into in our general study. These texts make clear the obligations of the workmen as given above in a very lucid and brilliant manner.

Bhriti or wages.

We get mention of the word Bhriti in the Rigveda, "O Indra, thou slayer of Vritra, we bring these unheard-of prayers to thee. We are thy constant worshippers, O much-invoked thunder-armed God! we bring the prayers as Bhriti to thee, (for thy gifts regularly as wages are paid). Rigveda (8-66-11). For Soma, this hymn is raised, Soma who is pure as the priest that offers offerings. Bring Bhriti to him who makes us glad with songs. (Rigveda-9-103-1).

We find the earliest reference to the law of hire in Vishnu. He says :—"A hired workman who abandons his work before the term has expired shall pay the whole amount of the stipulated wages to his employer and he shall pay a hundred panas to the king. What has been destroyed through his want of care, he must make good to the owner, unless the damage has been caused by an accident. If an employer dismisses a workman whom he has hired before the expiration of the term, he shall pay him his entire wages and he shall

pay a hundred panas to the king unless the workman have been at fault." (V.-v-153-159).

Bhriti depended upon contract and had to be paid before, in the middle of or after the work as agreed upon. Narada says :—The man who hires labour or services shall regularly pay the fixed wages to the workman hired by him, at the beginning, at the middle or at the completion of the work.

In the absence of contract, wages are to be fixed at one-tenth of the profit in some cases and in others according to the opinion of experts in trade and commercial affairs and those who are experienced in local conditions and customs of the time. (V. R.-156-158 texts of Narada and Vriddha Manu and others).

If the employee transgresses the direction of his employer regarding, for instance, the time and place in which the work is to be done and thereby causes loss to the work in which he is employed, he shall not get full wages but only as much as the master thinks fit to bestow. It however he brings in more profit by reason of his superior knowledge, regarding the mode of his work, then the employer should give him something in addition to the fixed emolument by way of reward, notwithstanding his omission to follow the directions which were given by the employer. Equitable principles governed contracts, so that in case of excellent work, a workman could get more than the stipulated wages. (Y-2-195).

When two men are employed to do a particular work, but the work is such that it cannot be completed by them and is therefore left unfinished, each shall then receive wages according to the amount of work done by him, the exact amount being determined by an arbitrator. If it is such, that both can finish it and is accordingly completed by the two persons, each shall get the wages fixed beforehand. (Y. 2, 196).

Wages are to be had for work done completely and fully. Manu says :—If a man, whether sick or well, does not perform or cause to be performed by others his work according to his agreement, he shall not get wages for that work, even if it be only slightly incomplete. (8-217). But in case of illness, if he performs the original work, according to the agreement, he shall get his wages even after a lapse of long time. (M-8-2-8). Medatithi in his Tika provides that if the man is dismissed by the employer during his illness and thereby he cannot finish it after recovery, then he shall get wages in proportion to the work done by him. Viramitrodaya adds that a sick man may cause the work to be done by somebody else. (V. M. 417).

Narada also says the same thing and he propounds the law that if the workman abandons the work not out of his sweet will but through some fault of the employer, he should get wages for portion of the work which he has already done. There are many reasons, for which, an employer can give up work. Viromitrodaya

illustrates it, by saying that the fault may be such, for instance, as bad temper, leading the employer to abuse the man without reason. (V: M. 417).

The modern law is also the same. It is held in (6 All 109)—When there is an express contract, it must be performed in its entirety or nothing can be derived under it and there is no rule for a quantum merit when no express contract has been made.

The rules of Kautilya illustrate the principles that we gather from the Smriti texts. He writes that the neighbours should know the agreements between an employer and an employee. The workman shall get the contracted wages. But this must be at the rate prevailing at the time. When not settled, a cultivator shall get one-tenth of the crops, a herdsman, one-tenth of the clarified butter, a trader, one-tenth of the sale proceeds. Wages, previously settled, must be adhered to and received as agreed upon.

Artists, artisans, musicians, physicians, buffoons, and servants and workmen, serving in expectation of the usual wages, obtain as much as persons of the same nature get usually or as much as are fixed by the experts. Witnesses shall give evidence in disputes. But when there is no witness, the employer shall be examined. Failure to pay wages brings punishment which varies from 6 panas to ten times the wages. Misappropriation of fine shall be fined with 12 panas or at five times the wages. A servant, who neglects

work after getting wages, shall be fined 12 panas. The same is for one who puts off work unreasonably. An artisan who is physically unable to do the work or is employed in a mean work or is involved in calamities should be excused or should be allowed to do the work by a substitute. The loss suffered by the employer shall the made good by extra work.

An employer shall be fined 12 panas when he does not employ the worker with whom the contract was that it should not be done by anybody else. The employer should be fined 12 panas when he fails to do the work after contracting that he would not do work elsewhere. An employee who has got his wages shall not go elsewhere for work of his own accord, before completion of the work.

Kautilya does not accept the view of law-givers who hold that if an employer does not take the work of the employee who is present and ready to do work, it must be held that the work had been done by the worker. Kautilya says that wages are for work done and not for work not done. The rule that if a man, after employing a worker for a short time does not engage him to do the remainder, though he be willing, must regard the unfinished as finished is not sound. Because, owing to changes, that have occured in time and place or owing to bad workmanship, the employer may not be pleased with what has already been done and so he has the right to dismiss the

workman. The worker should not also make the undertaking fruitless by doing in excess of the directions.

The law is the same with corporations and guilds. They shall have a grace of seven days over the agreed period. Beyond that time, they must find substitutes and get the work done. Without the consent of the employer the guild shall not leave out anything undone nor shall make any addition. For transgression, the fine is 24 panas danda when excess is done and half the same when part is undone. (Kau—184-5).

Rights and liabilites of the employer.

The employee stood in the capacity of an agent in many cases of bailments and Brihaspati says that if he acts within authority, he is not liable. He says that if a servant commits an improper act under orders from his employer and for the benefit of the latter, the employer shall be held responsible for it. Vyvahara-kalpataru explains improper acts to be thefts and the like, while Smritichandrika says that it is crossing the boundaries and the like. By analogy, this would apply to other cases, where the workers do illegal acts under orders of the principal.

Hindu lawyers held the balance equally between the employer and the employee and between the letter and the hirer. For breach of his own duties, the letter was held responsible. "If the employer

does not pay the stipulated wages after the work has been completed, he shall be compelled by the king to pay and also a proportionate fine" (Brihaspati—V. R. 165). Kautilya's rule is stricter. He provides ten times the wages as fine.

Hindu law further provides equitable rules for the kind and just treatment to the employees.

"If the employer abandons on the way, a workman who is tired or ill and does not wait in the village for three days in order to give him time for recovery, he should be fined in the first amercement." (Katyayana—S. C. 477).

The dispute between capital and labour is as old as the dawn of industry and business in human society. Hindu law tried its very best to keep down the rashness, cruelty and other high-handed works of the employer.

If an employer dismissed the workman before the expiry of the term, he shall pay him the entire wages and shall pay a fine of 100 panas to the king, unless the workman was at fault. The fault is explained as theft etc. by Smritichandrika. (S. C. 477).

Narada says, that in case the workman does not get the stipulated wages after work is done, he shall be made to pay it with interest, (V. R, 164).

The employer should pay wages regularly as stipulated. In the Sukraniti, we get that wages are according to work, time or according to both time and work. It is to be paid according to contract. When

remuneration is paid for a specific work, it is wages according to work. When wages are paid yearly, monthly or daily, it is regulated by time. When specific work is to be done within specified time, the wages is Karyakalamana *i. e.* determind according to both time and work. One should not stop nor make delay in making payments of wages. Wages are low when the worker can maintain himself with the remuneration, moderate when one can maintain the indispensable members of the family with the wages and good when one can maintain all the members of his family comfortably, with food and clothing. The employer should fix wages according to the qualifications of the workers. (Sukraniti—Chap II—991-804).

General Characteristics.

In hire, the benefit is mutual. One gets Bhriti, the other gets work done. "The main difference between bailments when the consideration is all on one side and hiring in its various branches is that in the latter, it is reciprocal; the owner of the thing hired or the hirer of himself, for whatever purpose, being paid in one case for the use of his property, in the other for that of himself; while he who contracts for the particular thing or service, derives a correspondent benefit from the temporary use of what he so hires. And upon

this reciprocity turns the responsibility, which the bailment in question stipulates"—(Strange—Pp 291-2).

In Coggs v Bernard, Lord Holt laid down :—"If goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses." Sir William Jones showed that this dictum was based on an erroneous interpretation of a Latin text and he says that the law requires of a hirer, the same degree of diligence, that all prudent men, that is, the generality of mankind use in keeping their own goods.

He illustrates :—If Caius therefore hire a horse, he is bound to ride it as moderately and treat it as carefully as any man of common discretion could treat and ride his own horse ; and if through his negligence, as by leaving the door of his stable open at night, the horse be stolen, he must answer for it ; but not if he be robbed of it by the highwaymen, unless by his imprudence, he gave occasion to the robbery, as by travelling at unusual hours or by taking an unusual road ; if, indeed, he hire a carriage and any number of horses, and the owner send with them his postilion or coachman, Caius is discharged from all attention to the horses, and remains obliged to take ordinary care of the glasses and inside of the carriage, while he sits in it."

Want of care *i.e.* neglect was regarded as a misconduct. But the worker in Hindu law was to exercise ordinary care and diligence. The degree of care and

diligence, required of a worker, will vary according to character and importance of the act and the class of the worker but the standard of determination was what a prudent man should take of his own things as in the case of deposits.

Vriddha Manu's text, briefly but very forcefully, summarises the law of care to be bestowed by a hirer. He is not liable for acts over which he has no control. He is liable for carelessness and doubly so when the negligence is prompted by malice.

The employer has the right to expect completion of work, according to reasonable skill. The acceptance by a person of work of a class which he holds him out as qualified to do amounts to a warranty on his part that he possesses the requisite skill and ability to do that work. In case, he fails to complete or do the requisite work, he is liable. We get this from Medatithi's Tika.

If an artisan approaches a rich man and prevails upon him to undertake the digging of a tank or the building of a temple and promises to supervise the work and see it through, but, subsequently, if he deserts the works, he should make good all the loss of money and energy that the employer might have suffered.

The jural relations between the bailor and the bailee in hire is determined by the law of the master and servant, but their distinction should be borne

in mind. A servant is under the control of the master but the hirer is not. There is merely a contractual relation to be determined by the terms and conditions of the contracts. Brihaspati calls workers, who do not work after taking fees and artists who takes money by fraud, to be open thieves. This is a proof that in Hindu India, the responsibility of an artist and a workman was great. Honest and upright dealings were expected of all concerned in business and commerce.

Breach of Warranty.

It follows from Manu's text, (8-203) which is about sale but the principles of which could apply to bailment that the bailee should not mix the bailed article with articles that resemble the same. "One commodity mixed with another must not be sold as pure nor a bad one as good one, nor less than the proper quantity or weight nor anything that is not at hand or that is concealed."

Medatithi explains this with illustration. One should not mix '*kunkuma*' with '*kusumbha*' which resembles it. One should not sell soiled garments and old and worn garments together. One should not give less in quantity or weight.

There should be no contract of things which are at a distance and which are beyond the sight of the

parties. One should not make an old thing appear new by repairing. This breach of warranty would entitle the suffering party to damages. This rule is not taken by analogy alone to the case of bailment. There is a clear text of Manu, (8-228) which says that if any body in this world repent of any completed transaction of whatever kind, the king shall keep him on the path of rectitude with the rules given regarding rescission of sale and purchase.

Jagannath's comment on it is that by the expression 'all business whatsoever' the law concerning rescission of purchase and sale is extended to other worldly affairs. Consequently, there is no offence in rescinding within ten days, a contract for a loan, for an association, or for service or a promise of wages or the like. But, after that period, these promises may not be broken or if they be retracted, a fine of six hundred panas must be paid to the king. This is consistent with the opinions of Chandeswara and Kullukabhatta ; but a fine may be inferred without a rule, (2D. 438).

Rescission of a Contract of hire.

Narada says :—"He who having shown a specimen of property, free from blemish, delivers blemished property shall be made to pay double the price and a fine to the same amount." (S. C. 514). This

applies to the case not only of purchase but also to hire. So that a hirer is entitled to rescind the contract when the letter showed a good thing but offers a bad thing at the actual time of delivery.

Narada says that there are six kinds of sale and purchase ;—by number, by weight, by measure, by practical test, by beauty and by lusture. Hire is also made on the self-same grounds. Nuts and flowers are sold by number, gold and silver by weight, grains by measure, public women by beauty and gems and jewels by beauty. These considerations and conditions arise also in hire.

If after taking the hire, the bailor does not deliver the object, he should deliver it along with any loss suffered by the hirer. This follows from the text of Yajnavalkya, (ii-254).

Vyasa says, if anything is paid as earnest money for making a bargain, then, if the transaction fails by anything done by the letter, he shall pay double the earnest money to the buyer. (S.c 516). Accordingly, a hirer should also get back double the earnest money which he has paid to make a contract of hire.

The rules for rescission of a contract on grounds of fraud, mistake, misrepresentation will also apply to the case of a hire. A repetition of them is unnecessary.

The picture of the commercial law we get from the discussions above is brilliant and has a great interest to the student of comparative Jurisprudence.

The first important characteristic is that the rules are of positive law and there is no atmosphere of formalism and ceremonialism associated with primitive law.

The second characteristic is that insistence is laid on loyalty and faithfulness in agreements. A man must be sincere in his conduct towards other men.

And above all a clear comprehension of the principles of '*vis major*', rights and liabilites of the letter and hirer indicate the high level of Hindu juristic genius and a very great advance in juristic ideas and conceptions.

CHAPTER VIII.

The Hire of Custody.

Locatio custodian or deposits for hire is a hiring for care and attention. The agistors of cattle come under this head. They do not ensure the safety of the cattle but they are merely responsible for ordinary negligence. It will however be such negligence for agistor or his servants to leave open the gates of the field and if in consequence of such neglect, the cattle stray away and are stolen, he will be responsible for the loss. They have also in virtue of their custody, such a possession and title, that they may maintain tresspass or trover against a doer for an injury to their possession or any conversion of the property. By the Roman law, the agistior was made responsible, not only for the reasonable diligence, but for reasonable will in his business which is also true in the common law, and ignorance of his proper duty is treated as negligence.

India is primarily an agricultural country, so cattle was regarded as the primary source of wealth from very early times. The law of agisting is therefore more elaborate in Hindu Law than that of any other country.

We have several references in Vedic literature to the duties of a keeper of the cattle "O thou Rudra, we should offer hymns to the just as the keeper who

receives cattle in the morning, returns the same in the evening." (1-114—G). Just as the herdsman drives his cattle quickly in the evening, so do I offer my songs, quick to the strong hero. (6-49-12).

Let them return to us again, under this herdsman
let them feed
Do thou O Agni ! keep them here and let the wealth
we have remain.
I call upon their herdsmen, him who knoweth well
their coming nigh
Their parting and home-return and watcheth their
approach and rest.
(Grifiths—10·19-3-4).

The above Rigvedic hymns give us a picture of the herdsmen and we learn how they were careful in guarding the cattle. In the white Yajurveda we get the names Hastipa, the keeper of elephants, Aswapa. the keeper of horses, gopala, the keeper of cows, Vipala, who looked after the strength of the cattle and Tejapala who looked after the energy of the beasts of burden. (30—11).

Rights and liabilities of the keeper, Pala.

The first duty of the keeper was to keep the cattle in his charge with care and diligence. Narada says—The owner shall make over the cows to the keeper every morning and the keeper shall bring them back to the owner in the evening after they have grazed

and drunk. (V. R. 171). Cows stand for animals in general and they should be returned before sunset.

Manu says, that during the day, the responsibility for the protection of the animals rest on the herdsman, during the night on the owner provided they are in his house but if they are kept otherwise, the keeper will be also liable for them during the night. (8-230). In the evening, the herdsman should return the beasts to their respective owners in the same condition in which they were entrusted to him. A paid keeper shall be made to make good the beasts, lost or killed by his negligence. (Y—2-164).

Manu says that the keeper alone shall make good the loss of a beast strayed, destroyed by worms, killed by wild animals or that has perished in an accident, if he did not exert himself to prevent it. (8-232). But he shall not be liable for an animal stolen by thieves, if he raises an alarm and if he informs the owner at the proper place and time. In case of death of an animal, he should carry to the owner, parts of the dead animal to prove the death. In case of an attack by animals, the herdsman must run to the assistance of goats and sheep, otherwise he would be responsible except in case of a sudden attack. (8-233-236).

Vyasa describes inevitable forces when a herdsman does not become responsible. "A keeper is not liable if an animal is destroyed or stolen, after he has been made a captive or during a raid or a revolution. (V. R. 172).

Narada amplifies the law. In case of an accident, the keeper should struggle to save it, to the best of his ability. If, however, he fails to rescue it, he should at once go to the owner and inform him should he neither struggle to save it, nor raise any alarm, nor announce to the owner, he must pay the price of the animal to the master and also a fine to the king. Brihaspati also says the same thing. (2D-458). Yajnavalkya gives the amount of fine. "When an animal is destroyed by the fault of the keeper, he shall make good the loss to the owner and shall pay a fine of thirteen panas and a half" (2-165). Parasaramadhava and Viromitrodaya interpret the fine to be 12½ panas. In an earlier text of Vishnu, we get the same rule. By nature of their occupation it was the duty of the cowherds to keep the entrusted cattle from dangers. "If an animal is attacked during day time by wolves or other wild animals and the keeper does not go forward to repel the attack, he is liable for the value to the owner." (V. R. 1J4).

The Brahma Purana is very strict and forbids neglect of duty by the keeper. "A hired keeper who leaves the beasts in a desolate forest and returns to the village for his pleasure, he shall be chastised by the king, just as a surgeon is punished, if he leaves his patient in town and goes to the forest." (V. R. 174).

It follows as a corollary that a keeper cannot take the milk of the entrusted cattle. Vishnu says that if

a herdsman milks a cow without the consent of the owner, he should pay a fine of 25 Karshapanas. (V. 5-139).

The next duty of the keeper was to see that the entrusted cattle do not commit any act of tresspass. Pasture lands and village commons were reserved for grazing of the cattle by the desire and consent of the villagers or under the orders of the king. There were provisions that the agriculturists should enclose their corn-fields by proper and adequate fences.

It was the duty of the herdsman to be careful that the beasts under his care do not tresspass into a cultivated field, or an enclosed garden or a tract full of grass and wood. (S. C. 487). Goutama provides that the owner is liable for cattle tresspass unless the herdsman is in charge. The keeper is liable for half the loss if the cornfield was not enclosed.

In case of tresspass, the cultivator had the right to catch hold of the straying cattle and beat them. If the owner objected to the whipping of the keeper and the animals, he had to pay fines. But apart from fines, in all cases, the crops damaged was to be made good to the cultivator. (M. 8-241).

Manu enjoins that if cattle do mischief in an enclosed field, near a highway or near a village, the herdsman shall be fined one hundred panas, but cattle without a keeper should be driven off. For damage in other fields, each head of cattle shall pay a fine of one pana and a quarter.

If the field is situated on the roadside, or on the outskirts of the village or in a field where grass and wood grow, there is no blame, if the cattle tresspass for a short time only ; nor if they are unfenced, (Narada in S. C.) nor if the tresspass is unintentional. (Y. 2. 162). In case of intentional tresspass, the punishment is that of a thief.

The keeper is entitled to get wages for the work done. Generally the keeper used to get a share of the milk. Manu says, (VIII—231):—"A hired herdsman who is paid with milk, may milk with the consent of the owner the best cow out of ten, if no other hire has been fixed. Brihaspati however says that he shall get the milk of all the cows every eighth day. (S. C. 483),

Narada provides that the keeper shall get a heifer annually for tending a hundred cows, a milch cow, a year for two hundred cows and shall get the milk of all the cows tended, every eighth day. (V. R. 170).

Medatithi however is more practical. In his Tika, he says that the wages are to be commensurate with the labour done by keepers. It should be higher or lower according to circumstances of each case. He shall get the third or the fourth part of the entire milk, when there are other cattle than milch cows and the exact rate is to be determined according to local custom. Parasaramadhava says that Manu's text applies to a keeper tending ten milch cows, but if some

cows are dry, the wages are to be fixed according to the cash-value of the milk.

Rights and duties of the owner of cattle—Swami.

Goutama says that the liability for damages by cattle-tresspass lies with the owner of the cattle. If a cow goes astray through the negligence of the keeper, damages the crop in a field, it is the keeper and not the owner that should be punished, (Narada—in S. C. 491). But this view of Narada is not accepted by Brihaspati who has laid down that cows should be kept away from crops, if the crops are damaged, the keeper should be beaten and the owner made to make good the damage and also pay a fine. The rule of Brihaspati is based on the law that the act of an authorised agent affects the principal with the same responsibility as he would have, if he had been acting in person. Viramitrodaya explains Brihaspati's rule to be applicable to the case of wholesale destruction.

Where the crops are entirely uprooted, the cultivator shall get the value of the crops, the keeper may be let off with beating and the owner shall pay the value and the fine. (Narada in V. M. 450). This is also the view of Yajnavalkya—The owner of a damaged field shall get compensation for as much crop as has been damaged. The keeper shall be chastised and the cattle-owner fined. (Y—2.-161). Mitakshara comments that the owner of the field shall get that quantity of straw

and crops which the village elders determine to have been damaged by the tresspass. The herdsman is to be chastised and beaten but he shall not pay the crops. The owner of the cattle shall get all the damaged crops and fodder.

Apararka says that the exact amount of damages should be determined by impartial arbitrators. Narada further provides that in case of tramplings, the seeds sown, should also be made good. (S. C. 492).

Mitakshara says that the texts of Yajnavalkya (2—159-160) about fines apply in case of unintentional damage. "For damages, done to crops by a buffalo, the fine is 8 mashas, half of that for a cow and a quarter of the same for sheep and goats. But the penalty is double, if after grazing, the animals squat in the fields. The penalty is the same for damage to a field of grass and wood and for a mule and a camel, the fine is as in the case of a baffalo". There is difference among the Smritikars about the fines to be imposed and the digest-makers have reconciled the same by saying that these different provisions arose in different localities.

Inspite of very minute provisions about fine, we find that the ethical end is emphasised not as anything of extraneous utility but an independent absolute good in itself. Accordingly Usanas provides :—"Neither ancestors nor deities taste the offerings of a man, who demands compensation for corn destroyed by cows." It is no doubt a moral precept ; there was no legal bar

to a demand for compensation. But what I want to say is that this text of Usanas has been quoted by the law-givers and this indicates that all of them placed great value and importance on moral values of action. Kant says :—"Act so that your rule of conduct permits you to desire it may become a universal law." The Rishis also say : "Act so that your selfish desires do not overpower you. In human conduct, in your treatment with humanity, you should consider the unreserved good as your goal."

There were certain exceptions, where there was no liability for cattle-tresspass. The royal animal, one possessed by an evil planet, one struck by thunder or bitten by a snake, one fallen from a tree or attacked by an wild animal or a diseased animal is not blamable for tresspass ; nor a cow within two days of calving, a public bull, the war-horses and the war-elephants which protect people, (S. C. 496). Usanas provides further that one-eyed and one-horned cattle, a new-comer, a strayed animal or animals used for festive occasions are not responsible for tresspass.

Cattle was of very great value in India and in Narada, we find elaborate rules laid down for recovery of the lost cattle. We find from Kautilya that the Government showed great care and attention in the matter. There was a department of live-stock and superintendents were appointed to supervise cows, horses and elephants. The protection of the cattle was a state

concern. In cases of theft and loss, the Government officers were very keen in tracing and finding them out. In Vivadaratnakara on the chapter on theft, the author quotes Narada which shows how experienced men and experts were sent by the king to trace lost and stolen cattle by footprints. (V. R. 835).

Kautilya's law on the subject.

I conclude the chapter with the rules given by Kautilya. These are similar to the provisions given by the Smritis.

"Lands full of grass and shrubs, high lands where no crops are grown and forests should be set apart for grazing of cattle. The owner of the pasture lands shall charge a fine at a quarter pana for a buffalo or a camel that stray after grazing, half of that for a cow, a horse or an ass, half of that for small quadrupeds. The fine is double, when the animals are found lying after grazing and double the same when they squat there during the night. Public bulls, dedicated bulls, cows within ten days of calving, old cows, and bulls for crossing are not to be punished.

If animals graze and crops are eaten away, the owner shall be made to pay double the loss after an estimate of the loss by the elders. But when a keeper graze cattle, without the kowledge of the owner of the pasture-land, he shall be fined 12 panas, and the owner shall be fined 24 panas. The fines are half for young animals. The punishment laid for damage of crops

will apply also for damage to fields of vegetables and plantations. The fine is double, when the enclosures are broken, when grains stored in houses, or threshing floor or a courtyard are damaged and eaten. If animals of the reserve forests are found grazing in a field, it shall be brought to the notice of the forest-officers and the beasts should be driven away without beating or killing. Stray cattle should be driven out by ropes or whips, persons hunting them in any way shall be responsible for assault or violence. Persons who induce others to commit wrongful tresspass and who are caught during tresspass should be restrained."

In the Hindu Law books, there is no mention of other classes of hire of custody. When a private man demands and receives a compensation for the bare custody of goods in his ware-house, or store-room, he is responsible as in case of deposits. The hiring of care and attention is guided by the same rules and laws as have been made for deposit. The expression "Adi *i.e.* and the like" includes all these classes. (Y-2—67).

The claims for care and attention which the law require of the bailee is correlative to the services and the rewards he get out of the transactions. Rules are, however, necessary as not everyone in this world is aware of his duties and obligations. Because of this inadequate insight, social measures of reward and coercion in the shape of law have been invented. Hindu law insists along with it on the complementary pressure of morality.

CHAPTER IX.

The Law of carriage.

In respect of contract of this kind, entered into by private persons, who do not exercise the business of common carriers, the rights and liabilities, the obligations and duties do not vary much from other bailees for hire. Every such ordinary carrier is bound to exercise ordinary diligence and to a reasonable employment of skill. Unless he expressly warrants the safety of the goods which he conveys, he is not responsible for losses, not occasioned by the ordinary neglect of himself or his servants. He will not therefore be liable for any loss by thieves or robbers or where the owner accompanied the goods to take care of them or for any inevitable accident, unless he is himself guilty of negligence.

Narada says:—"If the merchandise has been damaged by the carrier's fault, he shall have to make good the loss, except when it has been due to an act of God or the king. The term for carrier is Vahaka. He is liable as Smritichandrika explains when he damages or destroys the bailed goods due to his own fault of carelessness and the like. (S. C. 475)

The rule of Vriddha Manu that he will pay an equal value when the loss is due to negligence but double the price of goods entrusted when he damages out of malice, applies also to bailed goods to a carrier.

Yajnavalkya also says the same thing. Goods destroyed by a carrier shall be made good except in cases of destruction by an act of God or the king. He who raises obstacles at the time of starting and thereby disappoint the purpose, shall forfeit twice the amount of his hire. (2—179). Viswarupa says that in cases of fraud, the punishment is the same. Bhanda of the original includes weapons, implements and all sorts of things. Mitakshara explains that in cases of negligence, the fine should be proportionate to the loss of the goods given for carriage. Viramitrodaya says that a carrier who causes trouble at the time of starting is doubly liable, as it is difficult to find another carrier, so he should be punished strictly and rigorously. This also includes the case of a carrier who leaves, the work on half the way and thereby delays the work.

Jagannath's comment is this :—"Here 'purpose' is employed in a general sense : twice the amount of the wages must be paid for the mere disappointment of any business previously undertaken, but if the business cannot fail, the penalty is the full amount of wages only. So others who follow the Mitakshara. But the author of the Ratnakara says, "the word 'carrier' should be brought forward ; a carrier having received his hire and not departing when the business is to be done etc." In effect, there is no difference. Thus the amercement for him, who abandons his work, has been already declared, the penalty in the case of failure of the

business in consequence of his not performing the task is now propounded : loss is here the subject. Such is the meaning of both the commentators. This penalty may be increased, if the business might be greatly injured, for the servant does not disappoint it, if it be accidentally accomplished. The following texts make this evident.

Vriddha Manu—He who does not perform his task at the full time agreed on and disappoint the business shall be forced to pay twice the amount of his wages ; and another shall be employed in his place."

Yajnavalkya—One who declines the work when yet distant shall be compelled to pay the seventh part of his wages, or the fourth part, if he decline it on the way, but he who quits it half way, shall be forced to give the full amount of the wages." (2D—391). Chandeswar reconciles the inconsistency by allowing double the wages, when no servant can be found by any means. If another carrier can be immediately found, a seventh part of the hire must be paid by him who abandons the work, but twice, if he declines the work at the time of commencement. A carrier, who deserts work when a distant portion of the way remain untravelled, shall pay a fourth part of the hire or their full amount if he quits on half the way. This is the view of Mitakshara.

Jagannath says that the employer can get a carrier without too much trouble so he shall pay one-seventh,

but he who abandons at the moment of departure offends greatly and shall pay double the wages. At a near place if he shall abandon work, he shall pay one-fourth of the wages, as it is troublesome to get another carrier. But deserting at a distance place, he shall pay the full hire." (2D—392).

The bailee for carriage is liable for negligence. Legal negligence, apart from its metaphysical subtleties which are to be found in the law of the West is even there regarded not as a principle but a fact depending on and regulated by circumstances of each particular case. Regarded from this view, there is no difference between negligence and degrees of negligence.

Rolfe, J. in Wilson v Brett, (11 M and W. 115) "I can see no difference between negligence and gross negligence. It is the same thing with the addition of a vituperative epithet."

Hindu law decides cases of negligence with this ideals in view. Narada says: "If a carrier abandons goods which he had agreed to carry to its destination, he shall pay one ninth of the stipulated hire, the employer is liable for the hire with interest, if he does not pay the hire after completion of the work. (V. R, 164). The law required the same amount of good conduct both from the bailer and the bailee. Accordingly Vriddha Manu says:—"If the employer sells his goods on the way and gives up the carrier, he should get the hire for the entire stipulated

journey, including the part not yet traversed. (V. R. 164). But this exceptional liability ceases when their is any redeeming feature.

If however, on the way, the goods are confiscated by the king's officers or are stolen ; the carrier is to receive his hire for that part only which he has travelled. (Katyayan-S. C. 478). Smritichandika says that the hire according to the way travased is to be paid, when the hire was not paid before. But if paid before, the excess is to be realised back from the carrier.

The carrier is to get his hire, if there has been an engagement, even when the employer does not employ him. Law saddled the employer with the burden as soon as the contract was made. Unless for unforeseen grounds, if any one after having employed a carrier, does not make use of his services, he shall be made to pay a fourth part of the hire but he must pay the whole hire, if he gives him up on half the way. (Narada-V. R. 164). The exception does not occur in the text itself but it suggests itself on a comparison with similar rules.

Vriddha Manu says that a carrier will get his hire, when a man engages his conveyance but goes away without paying the hire, even if he does not make use of the carriage. (V. M. 420). It was the duty of the carrier to hire the goods to the destination within the stipulated period. It the articles

are broken or lost except by clash during carriage, the bailer will suffer for the same. Smritichandrika comments that when earthen or other jars are carried for conveying liquid goods, the carrier is not liable if they are broken by concussion with one another, but if broken otherwise, the carrier is to make them as they were before or replace the same and pay to the owner. Except in case of loss by clash, the loss is of the carrier and not of the owner Vivadaratnakara explains '*Samplava*' in the text as inevitable accident and irrestible force. He means that the carrier is liable for loss except in the case of inevitable accident or irrestible force. In his opinion, a thing lost or injured by the fault of the carrier, even by an act of God or the king e.g. after the lapse of time, the carrier is liable.

The hire must be acording to the time and the way to be traversed. Manu says, (8-406). :—"For a long passage, the boat-hire must be proportioned to the places and times. This rule is for river-routes only. There is no settled law for sea-freights.

Medatithi has illustrated this very lucidly in his Tika. The hire, for travel in river distances, is determined by '*Yojanas*' and by the places to be traversed. Time and current are also determining factors. During rains, when there is much water, the hire is less as the journey is easy, but in other times, it must be higher as it is an arduous journey and takes long time. Hire

increases according to distance also. But this distniction by miles and by places is not possible in sea-routes where there is no free movement, so there rates are to be settled by special contract.

Whatever may be damaged in a boat by the fault of the boatmen, that shall be made good by the boatmen collectively each paying his share. Taking a boat to a whirlpool or to a place where there is scanty water, keeping the ropes etc. loose and the like are the faults of boatmen. But this liability arises when the boatmen are culpably negligent. In the case of an accident caused by the will of God, no blame rests on them.

A carrier is not liable before goods have been delivered to him, nor after he has delivered them. The liability also ceases when the contract is otherwise performed, rescinded, countermanded or qualified by consent or a subsequent contract.

A carrier may be employed for a day, a fortnight a month, a season, half a year or a year. (Brihaspati—S. C. 458). When the hire has not been fixed, it must be determined according to the opinion of the experts. The text of Vriddha Manu is explicit and full of meaning and significance.

The wages of a carrier shall be such as are usually given by men who understand sea-voyages and who know countries, seasons and commodities, unless there has been a previous agreement. (V. R. 158). Vivada-

chintamani says the same thing and explains the passage to mean to people expert in commercial affairs.

A carrier has a lien on the goods carried for the price of its carriage. Lien in law is of two kinds :—general and particular. A general lien is the right to retain the property of another for a general balance of accounts, but a particular lien is a right to retain it only for a charge on account of labour employed or expenses bestowed upon the identical property detained. (Kent-634). The lien, which a carrier has, is particular and not a general lien.

We find no direct text in the Hindu law about this lien. But Hindu law which is a model of good sense and logical consistency may be construed to include lien by extending the law of pledge of good faith and honesty, (Charibravandhaka and Satyamkarkrita). As there were express provisions for realisation of hire, there was hardly any necessity for exercising the right of lien in ancient India.

CHAPTER X.

The Law of Common Carriers.

In common law, every person who undertakes to carry goods for hire is not a common carrier. A common carrier is one who exercises it as public employment and who undertakes to transport from place to place, for hire, the goods of such person as think fit to employ him. A common carrier, whether by land, water or air has extraordinary liabilities in consequence of the public nature of his employment, which rendered his good conduct, a matter of importance to the whole community. It is not a casual occupation but a regular business for transportation of goods on hire.

In ancient, India there was extensive trade and commerce and there were great facilities for communication both in water and land. India owed its fabulous property in the days gone by, largely to trade and commerce. During the Mauryas and the Guptas, the vast empires had regular services for communication. There are several passages in the Rigveda which prove the early existence of a complete navigation of the Indian ocean and of the trading voyages of Indians. Bhujyu, son of Tugra was shipwrecked but he was rescued in a hundred-oared galley. (Rigveda-1-116-). Varuna has full knowledge of the

ocean-routes along which vessels sail. (1-25-7). Merchants send out ships to foreign countries. (1-48-3). In the epics also, we had several references to the maritime activities of the ancient Hindus. There are numerous other references, in Sanskrit books, which indicate that the ocean was freely used by the Indians in ancient times as the great highway of international commerce. The Jatakas are also replete with references which prove that communication both inland and foreign was effected by caravans and ships. These caravans and ships used to carry goods and passengers for hire and were employed in fact as common carriers.

But there are however very scanty references as to the law applicable to these common carriers. The Yuktikalpataru gives elaborate directions, for decorating and furnishing ships, so as to make them quite comfortable to passengers. There were cabins which were called 'Mandirs' and there were three classes of ships called '*Sarbamandira*' '*Madhyamandira*' and '*Agramandira*' according as the cabins were extensive as the ship, in the middle or in the prows.

Kautilya gives us some ideas of the communication in the great Maurya age. There was a well-devoloped system of communication, a net-work of roads, trade-routes and water-routes; which radiated from the Capital to the four quarters. Of the many classes of roads mentioned by Kautilya, the trade-routes consisted of Chakrapatha (cart-track), Padapatha (foot-track),

Asampatha (narrow roads) and Kharostripatha (mule and cammel track). There were also various types of vehicles. The chariots used for travelling were known as Pariyanikas. There were carts named Laghuyanas, Golinga and Shakata. There were also palanquins and Pithikas which seem to be chairs, on which passengers were carried. There were arrangements that there should be hotel-keepers, all along the roads, to supply food and bread to the passengers who travel. Besides the land-routes, there were several classes of water-routes ; first, the river-routes including artificial water-ways, secondly, the coastal routes and thirdly, the ocean-routes. There were different classes of vessels—which plied over these routes.

There were superintendents of commerce and of ships. Those who imported foriegn merchandise and carried on foreign trades were favoured by remission of taxes. The conveyance-charges are called 'Yana-bhagaka, by him and the superintendent was to determine it, before sending goods to foreign countries. Kautilya however, shows his preference for land-routes over water routes ; as he opened that land-journey was safer than water-travel.

To keep pace with the brisk trade, which is the source of India's fabulous wealth, there were surely a large number of common carriers and most of them were joint-concerns. In the Smritis and the Digests, we learn that the trade-guilds had then separate laws and in

deciding disputes, these are to be followed and adhered to.

Yajnavalkya says that a king should maintain the customs and conventions that prevail among trade-guilds, trading corporations, heretical sects and among the Ganas. Katyayana also provides that the members of a corporation should always he strict in the observance of their conventions and shall carry on their work in accordance with these conventions. (V. R. 180).

But unfortunately, there is nothing to discover these long forgotten rules. Except the reference in Manu to joint liability, there is practically nothing from which we can find out the rules that determined the rights and liabilities of common carriers.

In common-law, while the goods are in the carrier's custody, he is bound to take the utmost care of them and unlike other bailees of the same class, he is responsible for every injury sustained by them, except only the act of God or the king's enemies.

There is nothing to trace that a common carrier was an insurer of goods committed to his charge. In common Law, he is responsible for their safe transport and delivery and is liable for injury, though there is no negligence on his part,

But Manu makes him liable for his fault only. (8-408). This also follows from the rules laid down regarding liability in cases of deposits. Manu's text is a sort of

marine insurance, which makes the sailors collectively liable for the losses, caused by their negligence.

A common carrier is bound to receive goods which are tendered to him to be carried for hire. A common carrier is bound to serve the public as far as the employment extends and for refusal, an action lies against him.

There is no clear text on this, but it follows from the rules that a public woman cannot refuse a customer after she gets her hire. A common carrier must deliver his consignment to the consignee or his agent or at an authorished place of delivery. He must accept goods for carrying within a reasonable time after they have been tendered to him, with a proper amount of hire and must deliver them to the consignee within a reasonable time.

These follows from the law of deposit which directs that the delivery should be according to the directions of bailment. A common carrier is liable for the negligence and felonious acts of his servants. The law was the same in Hindu India.

The Hire purchase agreement.

The hire-purchase agreements of modern times also fall under contracts that fall under bailment. These contracts are multiplying every day and even now, there is no separate codified law for them, neither in England, nor in India. Hire-purchase agreements

are not agreements for sale. The hirer gets the immediate delivery of the goods hired and he has the option either to buy or not ; so that he can return the hired goods at any time, during the continuance of the agreements. The property in the goods remains with the owner.

It appears from the above that the rights and liabilities of the parties to such a contract are those of the bailer and the bailee in a case of deposit. There is no material to ascertain whether such agreements were in use in ancient India. It is probable that this was not in existence, because such agreements are the results of the growth and development of the intense commercial civilization of our days.

These agreements generally have a forfeiture clause, which provides that in case of default in payment, the owner shall have the right to forfeit all payments till then made. There is a corresponding text in Vyasa, which though prescribed for sale and purchase applies to such hire-purchase contracts.

Vyasa says—If a purchaser does not come forward to take the article sold after paying earnest-money, the article becomes relinquished by him and he forfeits the money paid by him.

Gurantee is a very common and usual incident of a hire-purchase contract. Thc extensive law on sureties, included under the law of debt, is suficient to

cover cases of a gurantee, engaged to answer for the default or miscarriage of the hirer.

There is a warranty of fitness and quality and a correspondence of goods with description or samples shown. One, who is not owner is forbidden to transfer under the Hindu law. There is a text of Katyayana which will apply to cases of defects and unfitness for the purpose hired. "When an article has been purchased unknowingly, without due examination, if it is found faulty or defective, it may be returned to the seller within the period fixed for examination but not otherwise. (V. R. 199). The warrantly of quality is provided by Narada's text. "When a man shows an article to the buyer, which is faultless and later on gives another thing which is faulty and defective, the contract will come to an end and he shall pay twice the price to the buyer and an equal amount to the king."

The other rules and conditions which govern such contracts can be deduced by the ordinary methods of analogy and inference, from the rules of contracts, sales and gifts. The complexity of such contracts is to be construed according to the principles of well-laid rules of construction and interpretation.

CHAPTER XI.

Adhi.

Adhi is the Hindu name for pledge. Pledge means something given in security, it may be lands or goods. But in advanced Jurisprudence, a distinction is made between a pledge of immoveable property which is called a mortgage and a pledge of goods which is simply called a pledge. But generally in archaic laws, no such distinction is made as evident from the Roman law, in which the pignus applied to moveable as well as to immoveable property. In Hindu law too, Adhi includes both mortgage and pledge. But we shall confine our attention to pledge of goods, which strictly comes within the law of bailment.

Definition.

When ornaments and other things are deposited with the creditor to inspire confidence in regard to the loan, they form what are called pledges. because a title is created in the same in favour of the creditor. (V. M. 305). This is simple pawn. But Mitakshara defines Adhi as follows :—'Whatever is placed under the control of the creditor is called an Adhi'. It is wider and comprehends both pawn and mortgage.

Adhi is a collateral security for a debt for the confidence of the creditor ; so it is discussed as a part of the law of debt by the Hindu Jurists. Narada says that there are two grounds for confidence in the investment of money, first a surety, second a pledge.

Bonds and witnesses are two proofs conducive to evidence. Brihaspati has a similar text. The money-lender should advance a loan after securing a pledge of adequate value or a deposit or a trustworthy surety and should insist on a bond duly attested by witnesses.

There is difference between the different digest-writers as to the meaning of Adhi and Bandha. Adhi is a pledge to be used, such as a milch cow or an arable plot. Bandha is a deposit, which is not to be used or a pledge not delivered to the creditor but promised to be a security or a pledge with a mutual friend.

The law-givers had keen practical sense. Harita says :—"If a loan is given without pledge or surety or deposit and also without bond and witnesses, it cannot be proved, if a dispute arises over it. (S. C. 320).

Katyayana provides that no loan should be advanced to women, slaves and minors, for the lender will not get back the money lent. These persons were excluded as having no independent ownership, they could not be forced to repay the loan. (S. C. 321).

Jagannath says that there is no legal bar in giving and receiving loans from them. The prohibition is one of expediency as there is no certainty of repayment.

Classification.

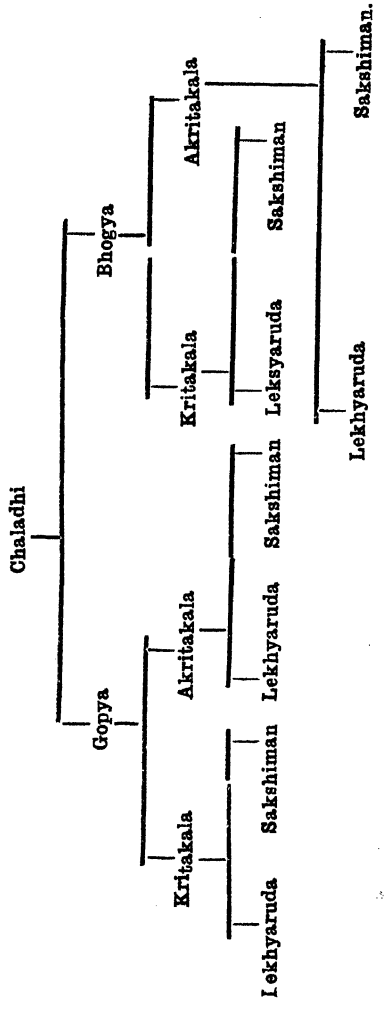
Pledges are divided into four classes, according to the nature, form, period and evidence. It may be of moveable and immoveable property relative to the nature of the thing pledged. It may be for mere custody or for use according to its form. Relative to

its time relation, it may be for a limited period or it may be unlimited in time. According to the nature of evidence, it is either with a written contract or with verbal agreement.

The four pairs constitute eight-fold divisions of Adhi. (V. R. 22) The above logical analysis is the work of the author of Krityakalpataru on the text of Narada and Brihaspati and it has been accepted by all the standard digest-writers.

Asahaya explains in his Tika that a pledge is of two kinds ; Chaladhi, (pawn of moveable goods) and Sthiradhi, (mortgage of immoveable property). A pledge of moveable goods, a chaladhi, is again of two kinds ; that which must be redeemed within a specified term and that which must be retained till the debt is discharged known as Kritakala and Akritakala pledges. A Kritakala pledge may be deposited with an Adhipala. who is to return it after the lapse of the specified time or it may be delivered to the creditor, who is virtuous, on condition of his returning it after the lapse of a fixed time, say five or ten years. Akritakala pledge is to be enjoyed until the debt is repaid. Each of this class may be for mere custody, or for use. Gold and silver vessels are given for custody, while lands, houses, milch cows, etc. are given for use. Mitakshara explains Kritakala with an illustration. The pledger contracts saying—'I shall repay the debt at the time of Dewali festival and redeem the pledge, otherwise the pledge will become your property.'

The following chart gives the eight forms of pledges of moveable goods.



Bharadwaja however divides pledges into four different classes (1) Gopya, (2) Bhogya, (3) Pratyaya, and Ajna. Of them, a pledge for use, evidenced by a written contract is the best. The second class is the pledge of valuables to the creditor for custody, the third is explained by Vyasa to be a pledge, which prevents the accruing of interest and diminishes the principal. The fourth class is a pledge which is kept under the orders of the king. (V. M. 307).

Devalopment of the pledge idea.

In the Rigveda, which is well said to be not a book, but a library and literature, we have extensive references to debts. Rna is a very common word and the Vedic Aryans looked upon debt as a curse. The following prayer to Varuna is evidence of the same.

"Discharge, O ! Varuna, the debts contracted by my ancestors and those by me. Let me not make my living, thou king, by wealth that is acquired by another. Full many a morn has not dawned as it were. Make us, Varuna ! alive in them. (Rigveda 11-28-9).

We do dot find the word Adhi or its equivalent in the Vedic literature and it cannot be gleaned, whether any security or pledge was taken for loans.

We come to the word Adhi in the Dharmasutras. This pledge originally was a delivery which served

as a means of satisfaction. It is the aim of the pledge that the thing shall by the operation of time become the property of the creditor. The change of ownership takes place as soon as the redemption term has passed. It was a creation of a secondary title, which, under certain circumstances, may mature into full ownership and thus created a real right as distinguished from a mere personal obligation.

At first, the delivery was with the pledgee but later on, it was deposited with a common friend, as a security for the repayment of loan. In times, an officer, known as Adhipala, was appointed by the kings, who used to keep deposits with them. In the third stage, there was the transition of the stake-holder into a surety for the production of the pledge.

As delivery to the pledgee may result in economic disadvantage, pledges which were originally for custody only were allowed to be enjoyed by the creditor. From the usufructuary pledge, developed after long centuries of experience, the arangement whereby the debtor retains the possession of the pledge and the creditor is not actually but legally secured. It is the Roman hypotheca and is called '*Bandha*' by the Hindu Jurists. Dr. Ghosh in his Law of Mortgage says :— "There can however be little doubt that in the mature Hindu law, the rule regarding tradition had fallen into disuse and that a real right, whether by mortgage or sale would be created by a mere expression of the

parties. (P 45)." Mr. Sen, however, holds otherwise in his Hindu Jurisprudence. I think that the view of Mr. Sen is incorrect. We find as early as in the Institutes of Vishnu, that if a dispute arises between two creditors concerning an immoveable property which has been mortgaged to both at the same time, then the mortgager shall enjoy its produce who holds it in possession without having obtained it by force. (V-5-184). Nilkantha in his Vyavaharamayukha says that Bandha is a binding agreement by the debtor, such as 'As long as your debt is not discharged, so long I will not alienate either by gift, sale or mortgage or in any other way, this house, land or other pledge. This is pure hypothecation and can be of pawns as well as of lands. This is the fourth stage which sees the gradual extinction of the intervention of a third party and the debtor is allowed to retain possession of the pledge,on his own undertaking not to alienate in any way, without being required to procure a surety to assure the production of the pledge, in case he fails to discharge his debt in proper time.

There are abundant texts which go to show that pure mortgages were in vogue from the beginning of the Smriti period. Though pawns without delivery were not common, still it is clear from Nilkantha's comment that such a pledge was recognised in law.

Incidents.

The incidents of pledge vary according to its class. In case of pledge given upon the definite understanding

that it must be redeemed within definite period, the pledger loses his right of redemption if he fails to carry out his undertaking and in this respect, it makes no difference whether the pledge was one for mere custody, or for use. Where, however, no such period is fixed by contract, then if the pledge be merely for custody, so that the pledger cannot get anything out of it, the satisfaction of his debt, the right of redemption is lost where the debt doubles itself .

Redemption of pledges.

"The pledger cannot get back the pledge without paying the whole amount of the debt to the pledger, he shall not be compelled to restore the pledge against his will, nor shall it be obtained from him by deceit or confinement." (1D-171).

The creditor must get the whole amount of principal and interest, before he should be made to return the pledge. The debtor cannot get it back even on payment of the greater part, however costly the pledge may be. If the debtor gives some other pledge and promises to give a written contract attested by witnesses, even then the former pledge cannot be taken back against the wish of the creditor—this is the gloss of Chandeswar in Vivadaratnakara. In case of a pledge for use, when the debtor tenders the principal sum and demands the pledge, it must be released then and there. Otherwise the creditor incurs blame. (S. C. 341).

Yajnavalkya provides that the creditor must restore the pledge, as soon as the debtor comes to redeem it. Otherwise he becomes liable as a thief. If the creditor be dead or absent, the pledger shall pay the debt to the next of kin and get back his pledge. (Y-2-62.) In the absence of the creditor, the value of the pledge at the time of offer may be appraised by experts and then it may be allowed to remain with the creditor but he shall get no further interest. (Y. 2-63). "In the Dipakalika, Sulapani observes, if the pledge for any reason be not returned to the debtor, the pledge, appraised at its the then value may remain in the house of the pledger, exempt from interest. For example, the creditor is present, but the pledge is at the creditor's house in another province and so he cannot immediately restore, in such cases, the pledge should be valued by men, conversant with the value of things after hearing both sides, and the pledge should be left with the pledgee." (1D-179).

This is the case of Akritakala pledges. If a period is stipulated, the debtor cannot redeem before the expiry of the term according to his own sweet will.

In Kautilya too, we find the same rule as in Yajnavalkya. "In the absence of the creditor, the debtor may pay the amount of debt to the village-elders and receive the pledge from the agent of the pledgee or the pledge may remain with the pledger but interest will not be chargeable from that and a

valuation of the pledge shall be made in order to guard against loss or damage. (Kau-178)."

The pledge is forfeited, if it be not redeemed when the debt is doubled. What is pledged for stipulated period is lost, on the expiry of the fixed term, but a usufructuary pledge is never forfeited. (Y. 258). If the debtor do not redeem the pledge by the time, the debt has been doubled, the pledge becomes the property of the creditor. According to Mitakshara, this text is applicable only to the cases of Kshayadhi, where the income from the pledge is to be taken for interest as well as for the principal.

Brihaspati says :—When the time for payment has passed, and when interest ceases on becoming equal to the principal, the creditor shall be the owner of the pledge, but still before ten days have elapsed, the debtor would be able to redeem it. (S. C. 331). The period of ten days is an additional period of grace to enable the the pledgor to get back the pledge.

Vyasa gives, however, a grace of a fortnight. Vivadaratnakara reconciles saying that the rule of Brihaspati is for debtors in prosperous circumstances while the rule of Vyasa refers to poor debtors.

The pledger becomes owner on two cases—(1) when the loan has become doubled (ii) and when the stipulated time has expired.

In the first class, when the pledge is for custody and its value is equal to the claim, the pledgee

retains the pledge and the debtor retains the money due from him. In case of unequal values, he is to sell the property ; appropriate his dues and return the surplus to the debtor.

If the pledge is for use and there is no time-limit, it is never lost. In the second class, the pledge is forfeited on the expiry of the fixed time, irrespective of the fact of the principal having doubled or not, and whether the pledge is one for use or one for custody. During the term of the stipulated period, neither the debtor can obtain his property nor the creditor his debt, except by mutual consent.

Rules for redemption.

When the debtor repays the debt and asks for the pledge, it must be restored to him. Under English law, a person cannot redeem the mortgage before the time appointed in the mortgage deed, although he tenders the principal with interests up to the time to the mortgager. But Hindu law is more lenient.

"Even before the principal has become doubled or the agreed time has elapsed, if the debtor comes up to pay up the debt, the creditor should restore the pledge and he should not try to retain it for the purpose of earning more interest." (V. M.) Vivadaratnakara, however, limits it to cases where there is no time-limit. But his view is not accepted by others. Pledges with time-limit cannot be redeemed only in cases of immovable

properties according to a special text of Brihaspati but this does not extend to pawns of articles and moreover the interpretation of '*Prakarsha*' as time-limit is not accepted by Mitakshara in that text. (V. R. 33).

Right of sale.

The right of sale is given to the pledgee in exceptional cases only. Where he has not the right of foreclosure, a power of sale is the essential development of the law of security. It is seen that it was recognised by the Hindu Jurists. But with an eye to the protection of the pledger, certain restrictions and safeguards were imposed. But this right was not given to a beneficial pledge.

Manu says :—But if a beneficial pledge (*i. e.* one from which profit accrues, has been given), he shall receive no interest on the loan nor can he transfer or sell it, even though there is a lapse of long time. Medatithi in his, Tika however, says that if the creditor becomes poor and the pledge damaged, he can report to the king and then sell even such a beneficial pledge.

Yajnavalkya says that if the creditor finds the debtor absent, he may sell the pledge in presence of witnesses. Mitakshara says that the right of sale is ordained for cases, where at the time of pledge, there was a covenant against forfeiture. Dipakalika adds that if the pawner be not present, then, selling the pledge and taking the amount of debt, the creditor

should deliver the surplus to the heir or to the king. Jagannath's comment is that if the debtor live in another country or happen to be absent, the surplus should be paid to debtor's son, brother or the like, before witnesses, so that the debtor may get it back on return. If there be no heirs or if they also be absent or refuse to receive it, in that case only, he should deliver it to the king. This sale is to be made with the permission of the king, when the debtor cannot be found being dead, having absconded or having gone to a distant province.

Brihaspati says :—When the debt is doubled by the interest, and the debtor is dead or becomes unheard of for a time, the creditor may attach the pledge or the debtor's chattel and sell it before witnesses. He shall have its value appraised in an assembly and keep the chattel for ten days ; (even if the debtor does not come by that time), he shall realise his dues by sale and leave the balance. If there be any one who recovers his dues after calculating it by experts in accounting and giving notice to the kinsmen and friends of the debtors, he commits no offence. The above is the rule for acknowledged or proved debts, but where it is denied, the creditor must prove the same by documents and witnesses. (V. R. 73 S. C. 387).

Katyayana provides :—"If the debtor or his heirs cannot be traced and the principal has become doubled the creditor shall notify the fact to the king and there

after the pledge shall be publicly sold. Out of the sale-proceeds, the pledgee shall appropriate his dues, both principal and interest and surrender the surplus to the king. Viromitrodaya adds that the king should get the surplus only when the heirs are not available. (V. M. 317).

The sale was also provided in cases of two special classes of pledges known as '*Charitravandhaka*' and '*Satyamkarkrita*', (pledges of good faith and pledges of solemn promise). Mitakshara explains that when a pledge of great value is given for a small loan by the debtor relying on the character and honour of the creditor or when a pledge of small value is taken for a big advance in reliance upon the good faith of the borrower, there will be no forfeiture. The pledge could be sold in such a case.

A pledge of solemn promise is where the debtor covenants to repay the debt and there is a distinct understanding that the pledge should not be taken in satisfaction of the debt.

To sum up, the right of sale is provided where in a case otherwise fit for forfeiture, there is express or implied covenant against forfeiture or when there is such disproportion between the value of the pledge and the debt ; that its appropriation would be inequitable either to the debtor or to the creditor. The sale is to be held after notice to the king or the public assembly and the surplus sale-proceeds should go to the debtor or

his heirs, In case of deficit, the debtor shall be compelled to repay the balance from his other properties.

Pledge creates a real right.

A pledge creates a real right as distinguished from a mere personal obligation to pay. Mitakshara says that the giving of pledge is a conditional cause of extinction of property. The acceptor acquired a conditional property-right which may mature into full ownership after the debt is doubled or the stipulated time has elapsed. By gradual and slow development, it became a real security. At first it was for mere custody and the pledgee was forbidden to sell or pledge it, as we find in the text of Manu. Next, it became possible for the pledgee to use it but with the same restrictions. Later on the pledgee had the right to enjoy and to foreclose and last of all to sell.

Right of Transfer.

The pledgee had no right of transfer at first. But with the growth of commercial life, the right to repledge it, was recognised. The provisions of the Hindu Jurists on the point, are that he must sub-pledge for the same amount or lesser amount. Jagannath in his commentary explains the difficulties and complexities that may arise in case of sub-pledge for a greater sum. "If the creditor contract a debt, assigning the pledge to a third party ; should he by chance fail to discharge his

own debt, and the original debtor comes to redeem his pledge, how should the matter be adjusted? On this it is correctly said, if a pledge for custody be transferred as a pawn to another, and the debt be less than the former one or equal to it, then discharging his own debt with the money paid by the original debtor, and then redeeming the pledge, he should restore it to the owner. But a pledge should not be transferred as a pawn for a greater debt". (ID-195). Vivadaratnakara also says that a pledge shall not be assigned for a larger sum. (V. R. 31).

"In case of a pledge for use, it should be transferred without any contradiction to the former agreement. For example, it should be assigned by the original creditor, with a declaration in this form 'the pledge shall be used so long as I do not cause the original debtor to pay the principal sum now borrowed' not in this form 'it should be enjoyed ten years or the like'. Yet, if that be done by any careless person, let the pledge be lodged in the hands of the ultimate creditor with the consent of the first lender, along with a certificate of its value at the time, settled by an appraisement made and signed by five persons. But, in fact, should a creditor transfer a pledge on dissimilar terms, he shall be punished." (ID—196). Viramitrodaya quotes a text of Prajapati and says that the sub-pledge must be for the principal only and not for a greater amount, because then there may arise conflicting claims

between the pledgee and the sub-pledgee and there may be difficulties in redemption. Parasaramadhava also explains this text that the sub-pledging should be for the principal amount without the interest that might have accrued on the loan and a deed should be executed for it. He further says that this must be done after the loan has been doubled. However, by consent, it may be done earlier. (P. M. 182). Viramitrodaya comments that the right of sub-pledging follows from the right to sell, one having a greater right can exercise the lesser.

It is clear from the above texts that the pledgee has the right of repledging the pawn.

Consequences of loss and use of pledge.

A pledgee, like a depositary, is bound to exercise proper care and diligence in protecting the pledge. Harita says :—The pledge must be preserved in the same condition as it was delivered, otherwise one should lose interest and he should lose the principal also. The protection and promotion of righteous life was the goal of the Hindu lawyers and the law of pledge is based by them on the principle of trust.

Smritichandrika explains this text differently. According to it, a pledge for custody is to be kept and a pledge for use is to be used. In case of a breach of contract, either the interest or the principal is lost Yajnavalkya says, one who uses a pledge for custody

loses his interest. If it is used by force, for so says Manu —'One should not enjoy pledge by force, if one does so, he forfeits interest.' As use is forbidden, one who does so by force commits a great offence, so he loses all the interest, even in case of a little use. The loss of principal and interest is ordained in cases of use for the full period and when it is done by force. (S. C. 323—4).

Manu says :—"The fool who uses a pledge without the permission of the owner shall remit half of his interest as compensation for such use." According to the commentators, this is the consequence resulting from the secret unpermitted use of a pledge in ordinary cases. While the loss of the whole of interest ensues in the case of a forcible use in contravention of a special prohibition. (8 – 150).

Narada ordains that one should keep the pledge as it was delivered. If on account of the negligence of the pledgee, it is lost or spoilt, he does not get his interest. (V. R. 22). Smritichandrika says that spoiling stands for diminution, transference, deterioration and similar contingencies. In case where it is done not by use in respect of a pledge for custody, the creditor should either restore the pledge in its original form or lose his interest, but if he has done it by use, he shall both restore the pledge and lose his interest. (S. C. 327).

Vishnu says—"If a pledge is enjoyed, there is no interest. The creditor must make good the loss of the

pledge, unless the loss has been caused by an act of God or the king." (V—656).

Yajnavalkya's text is very precise. "If the pledge for custody is used, there is no interest, so if a pledge for use is lost or damaged. If a pledge is destroyed except by an act of God or the king, it must be made good by the pledgee. (Y—2·59).

The pledgee has the right to demand fresh security or in the alternative payment of the debt on the determination, loss or destruction of the pledge without the the fault of the pledgee. Viramitrodaya quotes the text of Brihaspati on the point—'If a pledge be destroyed by inevitable accident or irresistible force, the pledger shall deliver another pawn or repay the debt with interest."

When grains, cattle or conveyances etc. are damaged or destroyed through the negligence of the pledgee, he could not demand a fresh security. Katyayana provides also for fresh security when the original is diminshed in value by fluctuations of the market or any other reason.

Vivadaratnakara, however, notes an exception. In some places, when a pledged cattle die, the debtor loses the pledge and the creditor his money, the account being squared by mutual loss. But this is done on the sole authority of long-established customs. (V. R. 26). This is the view of Vamanapurana also.

"A man should not neglect the approved custom of districts, the equitable rules of his family, or the particular laws of his race. In whatever country, whatever usage has prevailed through successive generations, let not a man there disregard it, such usage is law in that country." (I. D.—167).

The pledgee can also demand a new pledge, where the original has been stolen by thieves or otherwise lost without any fault of the pledgee. (S. C. 332).

Right and Obligations of the pledgor.

The pledger impliedly covenants that he has a good right to make the pledge and is answerable for all fraud not in the title but also in the beginning of the contract. Credit is the tardy growth of civilization and in primitive times, a mere promise to pay counted for very little. So actual possession of the pledge by the pledgee was insisted on. Yajnavalkya says that a pledge becomes valid by acceptance. (2—60). Brihaspati says :—When a creditor, neither uses a pledge, nor takes it from the pledgee nor proclaims it to others, his document of pledge is invalid like a document of which the executor and witnesses are both dead.

It follows naturally that the pledgee must get a pledge to which the debtor has good title. One should not make a transfer of an article to which he is no owner. This is clearly laid down in the topic of sale without ownership.

The pledger has the property in the article pledged. By pledge, he does not lose ownership. So that he can sell the pledge subject to the right of the pledgee and the buyer who steps into the shoes of the original pledgor acquires the right of redemption. The pawnor has the right of redelivery of the pledge on payment of the debt.

There is a text of Vasistha which says that when a man, having pledged a property to one, sells it to another, the former act prevails over the latter. (P. M. 178).

Yajnavalkya too says that in all transactions, the later ones supersede the former but in the cases of pledge, gift and sale, the prior transaction prevails over the subsequent ones.

Viromitrodaya explains that of two transactions of pledge, gift and sale, the first in point of time preponderates over the second, as after the first transaction the owner has no right of free disposal. But between a pledge and a sale, the sale is of greater value, because it thoroughly extinguishes title, so whether before or after. it supersedes a pledge. Between a deposit and a pledge, a pledge supersedes the deposit. It therefore makes it clear that a pledger has the right to sell his pledge, though it was not recognised by the earlier law-giver Vasistha.

In early Hindu law a second mortgage was not recognised but in course of time, it was recognised. But

the interesting question arises whether hypothecation of pledges was in vogue and whether in that case, a pledger can repledge it to somebody else. Vivadaratnakara says, if of two pledges, the first was without deposit and the second was with deposit, the second would prevail, ; if a sale was without acceptance of price and a second sale is made with acceptance of price, there the second sale would prevail. For Brihaspati says :— "By successive pledges, the prior pledge becomes force less. One who makes the transaction later is stronger than the previous transaction. If after making a deposit, one takes money and makes a pledge or makes a sale, then the last transaction supersedes the former ones." (V. R. 620). On the basis of this, we can say that there were hypothecations of moveables and in such cases, there were also instances for second pledging.

There was always a personal obligation of the debtor. Dr. Ghoh says : "In the absence of any express agreement to the contrary the pledger was personally bound to repay the money. But if the creditor chose to foreclose the mortgage and to take the property in discharge of the debt, he could not afterwards call upon the mortgager to repay the debt or any part of it" (Law of Mortgage P 50.) What he says of the Hindu law of mortgage applies equally to cases of pledge. This follows from the text of Manu :—"Even by personal labour shall the debtor make good what he owes to the creditor." (8—177).

It is laid down in the Contract Act that in the absence of any contract to the contrary, the bailee is bound to deliver to the bailer or according to his directions, any increase or profit which may have accrued from the goods bailed. The Hindu law is the same on the point. Brihaspati says :—When there has been an excess profit from the enjoyment of the house or land, the creditor is not entitled to get back the sum advanced and the pledger shall take back his pledge without paying the debt. This is the case where the excess is equal to the principal and interest, but in case of difference, it must be mutually settled. (Mitakshara 2-164)

A transferee from the pledger has the right of redemption, which the original pledger had. Raghunandan in his Dayatattwa says :—"Thus also if the pledge be not redeemed by reason of death or the like of the seller or donor, it may be redeemed by the buyer or donee, because a right equal to that of former owner has been generated by the sale or gift." In such a case, if a dispute arise as to the source of the right, then the buyer or the donee (who is admitted as such) is required to prove his possession and not the commencement of his title. (Dayatattwa—G. C. Sastri 32). It shows that a *primafacie* title was sufficient to entitle a person to redeem a pledge.

Rights and liabilities of the pledgee.

The pledgee is entitled to hold every separate thing which is comprised in the pledge, and also

whatever, by natural increase becomes accessory to it, as a security for the whole debt, but upon payment or tender of the debt to the pledgee, the property in the goods, notwithstanding his refusal to deliver them is instantly revested in the owner. The early law-givers insisted on possession. Both Yajnavalkya and Narada say that a pledge becomes valid only by acceptance. Viromitrodaya explains it that a pledge for use is accepted by use and a pledge for custody by putting it in the store-room. By pledge, the owner uses his full right of disposal but it comes back when he pays up the debt or tenders the same. Mitakshara says that it is a well-known popular notion that a transfer by pledge is a qualified cause of the creation of right.

A pledge is to be kept with care but when it loses its value after a certain time, the debtor should give another pledge or discharge the debt. But if it is rendered useless by the pledgee, he loses the principal, where a valuable pledge is lost, the creditor must somehow satisfy the debt. (S. C. 328). Manu says that if a pledge is spoilt by use, its original price is to be paid. Smritichandrika explains that the satisfaction should be made by giving the price after deducting the principal with interest up to the date of loss.

In case of animals and slaves, the pledgee should not take work from an unwilling pledge nor should he strike them with sticks or leather thongs nor should he scold them.

He should not use by force a pledge given for custody. But there are rules where he can use them. Brihaspati says that :—After the principal has doubled itself, a pledgee may use a pledge given for custody after notifying the fact to the debtor's family and in case of a time-limit after the expiry of the time. (V.R 33).

The pledgee can appropriate the pledge after interest has ceased becoming double but for the protection of the debtors a period of grace is provided for 10 days by Brihaspati and 15 days by Vyasa.

He is under the obligation to return the pledge as the debt is discharged and he should not detain it for wrongful gain of further interest (V. M. 319).

Fraud in Pledge.

Yajnavalkya has provided fines for the fraudulent pledger. If a man pledge or sell a covered casket, fraudulently substituted for a superior casket shown or an ordinary commodity after having artificially made it appear as a valuable article shall be fined. (Y 2-247). Mitakshara illustrates the text. The man shows to the pledgee one thing but delivers to him something totally different and of inferior quality e. g. he shows a sealed casket of pearls but delivers a casket of pebbles. An article is often artificially made and palmed off as the real thing e. g. musk. The Smritikars were fully alive to the consequences of fraud and made wise

provisions that a pledgee should not be befooled by a dishonest pledger.

Priority.

The general rule is that prior in time shall prevail. Viramitrodaya says that if an unrighteous debtor obtains loans from two creditors on pledging the same property, then the priority is to be determined by reference to possession.

Vasistha says :—When documents regarding a certain pledge are executed on the same day in favour of different persons, the first to possess has the prior claim over the pledge, But if neither has taken possession, it should be divided between them. (Vy. N. 67).

Vishnu says the same thing. If there be dispute between two creditors over the same pledge, he shall get it who has had possession without force. (Vishnu quoted in Apararka).

Mitakshara, basing his view on the text of Yajnavalkya and Narada gives emphasis on the fact of possession. So a pledge though prior is superseded by a subsequent pledge if it is accepted actually by the pledgee. The acceptance must be in good faith and without force or fraud and without notice of the prior pledge. But when it is ascertained which is first in date and which posterior, then the simple prior title affords the stronger evidence. (Dr. Ghosh—P. 49).

As we come to the later Smritis, we find some other rules about priority. Katyayana in Vivadaratnakara says that in case of dispute, a pledge evidenced by document prevails over the pledge evidenced by oral testimony. But even among documentary pledges, one which gives accurate and full description of the pledge supersedes the one which is not definitely specified. (V. R.38) Viramitrodaya quotes the similar text and says that if one pledges his all, at fiirst and then he pledges some definite property ; the definite pledge prevails over the indefinite all. (V. M. 313). If a man mortgages things in existence with non-existent imaginary things, then whatever that man has, should be deemed to have been pledged. (S. C. 338).

Priority between sale, gift & pledge.

Priority in time is the motive factor in determining rights in cases of several forms of transfer. It is laid down that when the time-factor is wanting, equity would treat them equally. If a man pledges a property and then sells it, the pledge being prior is effective.

But when there are three simultaneous transactions, pledge, sale and gift of the same thing, the following method should be followed. It is said by Brihaspati and Vasistha that if a man makes a pledge, a sale, and a gift of the same thing on the same date and a dispute arises as to which should prevail among them, the thing shall be divided into proper shares when all

the three transactions are proved, the first two, in the ratio of their respective considerations and the donee shall get the full one-third share. (S. C. 340). Though there is no loss of ownership, in case of a pledge, still a sale of the same was discouraged. As said before, if however the borrower sells the pledge, the buyer gets it subject to the pledge.

Sureties for Pledge

Katyayana says :—A surety should be taken for payment and for appearance, for the matter in dispute for confidence and for ordeal and similarly in other cases for due performance of transactions. Smriti-chandrika adds that, therefore in case of sale or gift of a pledge, a surety called Adhipal should be taken in case of a pledge for custody and a surety called Bhunjapaka should be taken for a pledge for use and in case of rare and valuable pledge, a surety called Pratyarpaka should be taken lest there be dishonest kinsmen.

Interest

Usery was deemed lawful from the earliest times. It is not strange therefore that great attention has been paid to the matter. There is a nicety of distinction and a very minute classification of interests. We get mention of six sorts—(a) Kayika-corporal, (b) Kalika-periodic, (c) Chakra-compound, (d) Karita-stipulated, (e) Sikha-daily, (f) Bhagalavha-usufructuary. In cases of pledge, the interest was less. Yajnavalkya

says :—When the loan is advanced on acceptance of a pledge, it shall carry interest at the eightieth part of the principal, otherwise, it may be 2, 3, 4 or 5 p. c. respectively according to the castes of the debtor. (2-37)

Vyasa says :—Where there is a pledge, the rate is the eightieth part per month, where there is a surety, it is the sixtieth part. It is 2 p. c. per month where there is no pledge. (V. R. 7). It proves that a pledge, over and above being a collateral security reduced the rate of interest.

Remarks of Megasthenes

Megasthenes has said :—"The Indians neither put out money at usery nor know how to borrow. It is contrary to established usage for an Indian either to do or suffer a wrong and therefore they neither make contracts nor require securities." (Fragment. XXVII). Like many other remarks of him, the above is far from the truth. Usery is as old as man. Debt was the first and the foremost subject that was treated in the law-books of the Hindus. Our study is sufficient to hold that the law of security had an interesting and comprehensive development among the Hindus. It is thoroughly logical and reasonable and served well the practical necessities of the people. Pledges for debt are of the highest antiquity. The commentators never professed to change the law, but under the guise of explanation they rationalised the law, just as the judges in modern times do.

CHAPTER XII.

Conclusion.

This brief survey of the Hindu law of Bailments cannot but prove interesting to all unbiased readers. It would prove conclusively that the remark ot Maine in his Ancient Law that the Hindu Law 'is in great part an ideal picture of that which in the view of the Brahmins ought to be the law' is unjust and far from the truth. The present study will convince the impartial scholars that the Hindu law on the subjects of deposit, hire and pledge bears a comparison with the celebrated Digest of Justinian or with the systems of Jurisprudence of most highly civilised nations of the world. The treatment is elaborate and deals with all varieties of points. The arrangement is natural and luminous and displays a subtlety which is characteristic of a nation noted for its acute logical bent. The discussion is full of that minute attention and discernment which the subjects require and is based on the natural principles of justice and equity.

Whoever examines these laws with the spirit of scientific enquiry and sympathetic appreciation, cannot have the least doubt that the Ancient Hindus were an enlightened and commercial people. Whoever reads them with care and attention will be surprised that these laws framed in the most remote antiquity have a minuteness of detail and nicety of distinction, which in many instances

have escaped the intelligence and attention of the advanced European races of the present age.

The complete lawyer must familiarise himself with the Principles of Hindu Jurisprudence in his own interest for it may be of great help to him in many cases of intricate and perplexing obligations. The more we know the Hindu law, the more would be our homage and devotion and the more our bouquets would predominate. The Hindu law of Bailment claims the the attention not only of the Jurist but also of the student of Social sciences, of the philosopher and in a wider sense of every educated man.

It is, therefore, with a proud heart that I place this study before the unbiased and appreciative lovers of culture and I am sure that they will find both entertainment and refined ideas from its perusal. It will broaden that human love and sympathy which is so essential for the expanding modern world of humanity, by proving unmistakably that humanity is the same in all ages and climes and that the brotherhood of man is not an idle illusion.

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